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In the Supreme Court of the United States

OCTOBER TERM, 1977

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

EVELYN ELLIOTT, ET AL.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

FANNIE BUFFINGTON, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the Secretary of Health, Education, and Welfare, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals on remand (App. A, *infra*, pp. 1A–35A) is reported at 564 F. 2d

1219. The initial opinion of the court of appeals (App. D, *infra*, pp. 40A–84A) is not reported. The opinion of the district court in *Elliott* (App. F, *infra*, pp. 89A–118A) is reported at 371 F. Supp. 960. The district court in *Buffington* did not write an opinion.

JURISDICTION

The judgments of the court of appeals (App. C, *infra*, pp. 38A–39A) were entered on July 1, 1977. A petition for rehearing was denied on December 15, 1977 (App. B, *infra*, pp. 36A–37A). On March 7, 1978, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including April 14, 1978. On April 5, 1978, Mr. Justice Rehnquist further extended the time to and including April 21, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Due Process Clause requires that an oral hearing be held before, rather than after, a Social Security beneficiary's payments are reduced in order to recoup an erroneous overpayment.

2. Whether a nationwide class action, on behalf of persons who have not met the jurisdictional requirements of Section 205(g) of the Social Security Act, may be maintained to challenge the procedures used to process social security cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. The Fifth Amendment of the Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

2. Section 204 of the Social Security Act, 49 Stat. 624, as amended, 42 U.S.C. 404, and the regulations of the Department of Health, Education, and Welfare, are set forth in pertinent part in App. G, *infra*, pp. 119A–156A.

STATEMENT

1. Section 204(a)(1) of the Social Security Act, 42 U.S.C. 404(a)(1), provides that in the event of an erroneous overpayment to a Social Security beneficiary, "proper adjustment or recovery shall be made, under regulations prescribed by the Secretary [of Health, Education, and Welfare] * * * [by] decreas-[ing] any payment under this subchapter [relating to old-age, survivors', and disability insurance] to which such overpaid person is entitled." Section 204 (b) of the Act further provides, however, that "there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." This case concerns the constitutional validity, under the Due Process Clause, of the procedures used by the Secretary in implementing these provisions.

Under the Secretary's procedures, once the Secretary has initially determined that an overpayment has been made, the recipient is notified of the determination and given an opportunity to contest the determination in writing and, in addition or in the alternative,

to request that the Secretary waive recovery in accordance with Section 204(b) of the Act. He is invited to discuss his case with the local Social Security office. See 20 C.F.R. 404.907–404.913 (App. G, *infra,* pp. 150A–153A). With one minor exception, adjustment or recovery is deferred pending review of the initial determination (App. G, *infra,* pp. 126A, 134A, 139A).[1] If the Secretary decides on review that the initial determination of an overpayment was correct and that waiver of recovery is not warranted, the beneficiary's subsequent monthly benefit payments are reduced until the overpayment has been recouped, as provided by Section 204(a)(1) of the Act (App. G, *infra,* pp. 155A–156A).

Following the Secretary's decision on this initial review, the beneficiary is entitled to further administrative review, including a full evidentiary hearing. 20 C.F.R. 404.917 (App. G, *infra,* pp. 154A–155A). If, following the hearing, the Secretary determines that there has been no overpayment, or that the beneficiary is entitled to waiver of recovery, the beneficiary's withheld payments are repaid and his subsequent payments restored to the appropriate level.

[1] The Social Security Claims Manual § 5503.1 provides in pertinent part (App. G, *infra*, p. 127A):

"The only exception to this rule is when the overpayment results from the superendorsement procedures under Section 205(n) of the Act whereby payment of a combined check is made to the survivor. Under such circumstances the surviving beneficiary is given notice at the time of superendorsement of the adjustment action that will be taken to recoup the amount of the check which exceeds the amount to which the surviving individual is entitled in his own right.

"In the above situation, an immediate adjustment action is taken."

2. Suits challenging this procedure were filed in the United States District Court for the Western District of Washington (*Buffington*) and the United States District Court for the District of Hawaii (*Elliott*). The cases present the same issues and were consolidated by the court of appeals.

a. The named respondents in *Buffington,* Mrs. Buffington and Mrs. Biner, are recipients of Social Security retirement benefits. The Secretary determined that respondents had received an overpayment and sought to recoup it. The determination was made on the basis of annual reports of excess earnings filed by respondents. 42 U.S.C. 403(h) requires a beneficiary to file such reports when his earnings exceed the statutory maximum (see 42 U.S.C. 403(f)).

The amount of Mrs. Buffington's overpayment was $78.60. She was notified of the overpayment on October 3, 1973, and the $78.60 was withheld from her November 1973 check.[2] She then requested reconsideration by the Secretary, who sustained the determination that there had been an overpayment (App. A, *infra,* p. 8A). On October 22, 1974, the district court ordered the Secretary to restore to respondent the amount recouped from her until she was given the opportunity for a hearing (App. D, *infra,* p. 42A).

[2] Under the Social Security Claims Manual provisions effective in October 1973, administrative reconsideration occurred only after the beginning of recoupment, where the Secretary's original overpayment determination was based on an annual earnings report filed by the beneficiary himself.

The amount of respondent Biner's overpayment was $2,216.20, representing the total amount of benefits she had received during 1972. After the Secretary's initial determination of an overpayment, Mrs. Biner twice requested reconsideration of the finding that there had been an overpayment; she also requested that recoupment of the overpayment be waived. After considering Mrs. Biner's submissions, the Secretary adhered to his decision that recovery of the overpayment was appropriate (App. D, *infra*, pp. 50A–51A).[3] After the institution of this suit, Mrs. Biner received an oral hearing before an administrative law judge, who sustained the Secretary's decision (App. D, *infra*, p. 51A).

On December 11, 1973, respondents Buffington and Biner brought this suit as a class action, contending that the Secretary's procedures for recovering overpayments fail to provide due process of law because they do not afford claimants a pre-recoupment oral hearing. The district court determined that it had

[3] In denying Mrs. Biner's request for waiver, the Secretary found Mrs. Biner at fault in retaining the benefit checks. Mrs. Biner had worked throughout 1972 and had earned more than $7,000 for the year—a sum that precluded eligibility for any benefit payments. Mrs. Biner did not, however, file a report of excess earnings for that year. The Secretary subsequently learned from Mrs. Biner's employer that she had excess earnings and requested that she file an earnings report. When she did so, the overpayment was determined. On the basis of these facts, the Secretary concluded that Mrs. Biner was not without fault in receiving the overpayment and therefore refused to waive recoupment (Affidavit of Forbus, Deputy Director, Bureau of Retirement and Survivors' Insurance, Social Security Administration; App. A, *infra*, pp. 8A–10A).

jurisdiction under 28 U.S.C. 1361 and certified the case as a nationwide class action, defining the class as all persons eligible for old age and survivors' benefits whose benefits have been or will be reduced or otherwise adjusted without notice and opportunity for a prior hearing (App. D, *infra*, p. 54A; district court order of April 4, 1974).[4] The district court declared the Secretary's recoupment procedure unconstitutional and enjoined the Secretary from recovering any overpayment from members of the class without affording them an opportunity for a pre-recoupment hearing (App. D, *infra*, p. 42A).

b. The findings of overpayments to Mr. Silva, Mr. Vaquilar, and Mrs. Ortiz—three of the named respondents in *Elliott*—also were based on their own reports of excess earnings (App. F, *infra*, pp. 93A–94A). The overpayments to the other named respondents had been mistakenly made for other reasons: Mrs. Elliott received both retirement and disability benefits when she was entitled to only disability payments; Mr. Gaines received duplicate checks for the same benefit period; Mrs. Yamasaki was overpaid because of a processing error (App. F, *infra*, pp. 96A–98A). All of the respondents sought reconsideration and waiver from the Secretary but initiated this suit before the Secretary could act on their requests. All monies recovered from respondents have been restored to

[4] The class order was later modified to exclude groups of beneficiaries whose claim to a prior hearing was already the subject of litigation in other courts (App. D, *infra*, p. 54A; district court order of October 29, 1974). See note 8 *infra*.

them by order of the district court (App. F, *infra*, p. 117A).

The *Elliott* respondents challenged the constitutionality of the Secretary's recoupment procedures on the same basis as the *Buffington* respondents. The district court in *Elliott* declared the recoupment procedure unconstitutional and enjoined the Secretary from recovering overpayments from Social Security old age, survivors', and disability beneficiaries residing in Hawaii, without first according those beneficiaries an opportunity for an oral hearing (App. F, *infra*, pp. 93A, 112A, 117A).

c. The court of appeals affirmed the holdings of the district courts with regard to jurisdiction and the propriety of class relief. The court further affirmed the holdings that the Secretary's recoupment procedures are unconstitutional, but it remanded the cases to the district courts for the entry of more limited orders that would require a prior oral hearing only where the Secretary's determination might turn on the credibility of witnesses.[5]

[5] For purposes of convenience, the court distinguished two categories of overpayment disputes, "reconsideration" cases and "waiver" cases. "Reconsideration" cases generally involve the correctness of the Secretary's determination that an overpayment has occurred (*e.g.*, whether the computation of an earnings statement is correct, or whether two benefit checks have been received rather than one) and ordinarily can be decided on the basis of documentary evidence. But in "waiver" cases, the court concluded, issues of credibility often are involved in determining whether a claimant was at fault in receiving an overpayment. The court determined, however, that the constitutional necessity of a prior hearing turns on the particular facts of each case and not on whether the case is one of "reconsideration" or "waiver" (App. D, *infra*, pp. 75A–82A; see also App. A, *infra*, pp. 23A–30A).

3. After the initial decision of the court of appeals, this Court held in *Mathews* v. *Eldridge*, 424 U.S. 319, that the Due Process Clause does not require an oral hearing prior to termination of Social Security disability benefits. The Secretary then filed a petition for a writ of certiorari in these cases (No. 75–1234), challenging the decision of the court of appeals as inconsistent with the principles established in *Eldridge*. This Court granted the petition, vacated the judgments, and remanded for further consideration in light of *Eldridge* (425 U.S. 987).[6] On remand, the court of appeals adhered to the essential features of its earlier conclusion (App. A, *infra*, pp. 1A–35A).

The court distinguished *Eldridge* on two grounds. First, the court declared that, unlike the medical disability inquiry in *Eldridge*, waiver determinations (particularly those involving recipients' fault in inducing or retaining overpayments) frequently turn on issues of credibility, and thereby entail a greater risk of erroneous deprivations if an evidentiary hearing is not provided (App. A, *infra*, pp. 24A–30A). Second, the court thought that the administrative burdens associated with requiring an oral hearing prior to

[6] The Court also granted certiorari and vacated the judgment in *Mathews* v. *Mattern*, No. 75–649, a petition to review a case from the Third Circuit raising identical issues. The court of appeals then remanded *Mattern* to the district court, and on March 7, 1977, that court held that *Eldridge* is not materially distinguishable from the situation presented here. Accordingly, the district court granted summary judgment for the Secretary, 427 F. Supp. 1318 (E.D. Pa.). The case is pending on appeal in the Third Circuit, No. 77–1629.

recoupment are substantially less onerous than the corresponding burdens that would be imposed by a similar procedural requirement as a precondition to termination of disability benefits. The court predicted that Social Security beneficiaries would request pre-recoupment evidentiary hearings in only a small percentage of overpayment cases, and it stated that, in contrast to the termination situation, benefits paid during the course of additional pre-recoupment review would almost always go to persons entitled to receive them (App. A, *infra,* pp. 30A–33A).[7]

With respect to the jurisdictional issues raised by the Secretary, the court of appeals also adhered to its previous ruling. The court upheld the district courts' exercise of mandamus jurisdiction under 28 U.S.C. 1361 to grant injunctive and class relief that the court of appeals recognized might not be available under Section 205(g) of the Social Security Act, 42 U.S.C. 405(g) (App. A, *infra,* p. 10A n. 10).

[7] The court held that requests to reconsider the finding that there had been an overpayment generally would not require a prior oral hearing and that requests to waive recoupment generally would require a prior oral hearing (App. A, *infra.* pp. 23A–30A, 33A–34A). The court stated however, that the requirement of a hearing would turn on the facts of each case.

This Court recently has discussed the consequences of a rule under which the agency cannot know, until the case is over and a court has spoken, what procedures it should have used. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, No. 76–419, decided April 3, 1978, slip op. 24–26. This case illustrates the agency's response to an uncertain procedural rule. Since the date of the court of appeals' first opinion in this case, the Secretary has endeavored to offer a prior oral hearing in all recoupment cases involving class members.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in these cases represents an improper and unwarranted extension of the rule of *Goldberg* v. *Kelly,* 397 U.S. 254, to the Social Security program. If not reversed, the decision will impose on the administration of that program a substantial and costly burden wholly disproportionate to the limited private interest that would be served. Moreover, because the district court in *Buffington* certified a nationwide class action, the decision here has far-flung consequences. There cannot be any further consideration of this problem by the lower courts, and a meaningful conflict among the circuits cannot arise.[8] If the Court does not grant review here, the decision of the court of appeals will become conclusive.

In response to the Secretary's previous petition in this case, this Court vacated the judgment of the court of appeals and remanded for reconsideration in light of *Mathews* v. *Eldridge,* 424 U.S. 319. The court of appeals' adherence, on remand, to its earlier ruling is inconsistent with the analysis of *Eldridge.*

1. The Secretary's procedures governing the recovery of Social Security overpayments provide a fair and reliable basis for determining whether an overpayment has been made and, if so, whether re-

[8] The nationwide class excepts only cases now in litigation in other courts. See page 7 and note 4, *supra.* The case now pending in the Third Circuit (*Mathews* v. *Mattern, supra*), therefore would govern only a few decisions and would have limited prospective effect.

covery should be waived. The additional administrative and social costs associated with prerecoupment evidentiary hearings significantly outweigh any social benefits that accrue from such a requirement. This Court recognized as much in *Eldridge,* when it held that an evidentiary hearing need not be held before termination of Social Security disability benefits. 424 U.S. at 349.

The Secretary initially makes a determination that an overpayment has been made. The beneficiary is notified by mail of the determination and is advised of his right to request reconsideration or waiver. If the beneficiary responds within 30 days, the Secretary defers recoupment until he has acted on the request.[9] In seeking reconsideration or waiver, the beneficiary may consult personally with officials at the Social Security district office, which is usually located near his home. The beneficiary may supply whatever documentation he wishes in support of his position, and printed forms are made available to facilitate the presentation of the beneficiary's case.

Only after the Secretary has fully evaluated the beneficiary's case, and has adhered to his initial determination that recoupment is appropriate, does the process of recovering the overpayment begin. As soon

[9] Any objection at all within the 30-day period is sufficient to postpone recoupment. Even if the beneficiary does not make a request for reconsideration or waiver within that period, a reconsideration request made within sixty days, or a waiver request, whenever made, will result in a resumption of full benefits until the request has been acted on (App. G, *infra*, pp. 126A, 139A).

as the beneficiary is advised of the Secretary's determination, he may request a full evidentiary hearing with respect to his claim.

The beneficiary thus knows the basis for the Secretary's proposed action and may present objections to that action before it is taken. Although these objections must be submitted in writing, the beneficiary can discuss his case with local Social Security officials, who are responsible for assisting him in providing all the information necessary to evaluate his case. Finally, any beneficiary who is still dissatisfied with the Secretary's decision after initial review has the right to a full evidentiary hearing after recoupment has started. If the Secretary's decision is reversed after that hearing, the beneficiary receives full restitution of any benefits previously withheld.

These procedures adequately protect the beneficiary's interest in avoiding improper reduction of payments. The beneficiary can appear personally before and consult with the local Social Security officials who are responsible for developing the facts concerning his claim (App. G, *infra,* pp. 125A–126A, 127A–131A). He thus has an opportunity for a pre-recoupment meeting with officials who may assess his credibility in the course of gathering the facts necessary for regional office review. Moreover, in situations where the beneficiary requests waiver rather than reconsideration, he by definition acknowledges that he is not entitled to the payments he received. In such circumstances, the Constitution does not bar

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the Secretary from proceeding to collection, subject to a possible return of the monies if the beneficiary's equitable contentions are sustained after a subsequent oral hearing. See, *e.g., Dixon* v. *Love,* 431 U.S. 105, 112–116. Cf. *Arnett* v. *Kennedy,* 416 U.S. 134, 150–158; *Mitchell* v. *W. T. Grant Co.,* 416 U.S. 600.

The Secretary's recoupment procedures are a constitutionally permissible accommodation of the factors that must be considered in determining what procedures the Due Process Clause requires in a given situation. The Court in *Eldridge* identified three such factors (424 U.S. at 335):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Having evaluated these factors, the *Eldridge* Court declined "to depart from the ordinary principle * * * that something less than an evidentiary hearing is sufficient prior to adverse administrative action" (*id.* at 343).[10] No such departure is justified in this case.

[10] The Court noted that only in *Goldberg* v. *Kelly, supra,* had it held that "due process requires an evidentiary hearing prior to a temporary deprivation" (424 U.S. at 340). The outcome in *Goldberg* turned on the welfare context of that case. In the Court's words, "termination of [welfare] aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits" (397 U.S. at 264). By contrast, here, as in *Eldridge*, the benefits at issue are not distributed on the basis of the need of the recipients. Eligibility for Social Security retirement benefits, like eligibility for Social Security disability benefits, is unrelated to the recipients' "income or support from many other sources" (424 U.S. at 340–341).

See also *Dixon* v. *Love, supra* (no prior hearing needed for suspension of driver's license); *Smith* v. *Organization of Foster Families,* 431 U.S. 816 (an informal conference with state personnel is sufficient process before removal of a foster child from a foster home).

(*a*) The private interest in the uninterrupted receipt of benefits pending final administrative action is less substantial here than in *Eldridge.* That case involved termination of all disability benefits; this case involves only a temporary reduction in otherwise continuing benefits in order to recover overpayments. Not only will full benefits resume once recoupment is complete, but, under prevailing regulations and Social Security Claims Manual provisions, beneficiaries may request that recovery be spread out to diminish the amount by which monthly payments are reduced. See 20 C.F.R. 404.502(c) (App. G, *infra,* pp. 146A–147A); Claims Manual §§ 5515, 5515.2, 5515.4 (App. G, *infra,* pp. 141A–145A). Such extensions of the recoupment period (called "partial adjustments") are routinely granted, unless the overpayment was the result of fraud or unless "the beneficiary has income and resources sufficient to meet current ordinary

expenses despite a loss of the full monthly benefits" (Claims Manual § 5515.2(a)).

The partial adjustment system ordinarily permits monthly payments to be maintained at a level that enables the recipient to meet current expenses.[11] In the absence of fraud, monthly benefits will not be reduced by more than 25 percent, unless the beneficiary's other resources permit larger withholdings.[12] Thus, unlike the termination of disability benefits in *Eldridge,* recoupment of Social Security overpayments usually does not require discontinuance of monthly payments.

Moreover, in the event that recovery of excess retirement or disability insurance benefits creates a situation of financial need, elderly or disabled recipients generally will be eligible for Supplemental Security Income (SSI) benefits under Title XVI of the Social Security Act, 42 U.S.C. (Supp. V) 1381 *et seq.* By contrast, because the definition of disability for Social Security and SSI purposes is the same

[11] If the partial adjustment necessary to allow the recipient to meet current expenses results in a withholding so small that full recovery of the overpayment is not possible within 36 months or before the end of the recipient's entitlement to benefits, the Secretary will withhold as much as 25 percent of monthly payments even though this may reduce benefits below the level necessary to meet current expenses. Claims Manual § 5515.4(d)(3) (App. G, *infra*, p. 145A).

[12] The sole exception to this general rule is the Claims Manual requirement that monthly withholdings be at least $10. This minimum monthly withholding presumably applies even if $10 is more than one-fourth of monthly benefits. Claims Manual § 5515.4 (d)(1) (App. G, *infra*, p. 144A). (Few monthly Social Security payments are less than $40.)

(compare 42 U.S.C. 423(d)(1)(A) and (d)(2)(A) with 42 U.S.C. (Supp. V) 1382c(a)(3)(A), (B)), a person whose disability insurance payments are terminated by virtue of a finding that his disability no longer exists, as in *Eldridge,* almost certainly would be ineligible for SSI disability benefits (424 U.S. at 342 n. 27). For this reason as well, therefore, the private interest in avoiding improper recoupment of overpayments is not as great as the private interest in avoiding incorrect termination of disability benefits.

(*b*) In weighing the risk of erroneous deprivations in the absence of additional or substitute procedures, the *Eldridge* Court focused on "the nature of the relevant inquiry" and the extent to which existing procedures "provide an effective means for the recipient to communicate his case to the decisionmaker" (424 U.S. at 343, 345). The Court observed that the medical assessments necessary for resolution of disability issues are particularly well suited to presentation in documentary form. In addition, the Court noted that the procedures employed were designed to inform recipients of the factors likely to be critical in the entitlement decision, to ensure recipients full access to information on which the decisionmaking agency relied in reaching its initial determination, and to afford recipients an opportunity to respond to that evidence identified by the decisionmaker as most significant (424 U.S. at 345–346). The Court concluded that, under these circumstances, the lack of an evidentiary hearing prior to termination of disability benefits did not create an intolerable risk of error.

By contrast, when the Court addressed the subject of welfare terminations in *Goldberg* v. *Kelly, supra,* it held that exclusive reliance on written submissions violated the Due Process Clause. Where the criterion for public assistance is "need," issues of witness credibility may be of central importance. Documentary evidence alone may be inadequate to describe fully the economic situation of a welfare family. The *Goldberg* Court also stressed that persons threatened with termination of welfare benefits frequently cannot write effectively (397 U.S. at 269). Moreover, the procedure under scrutiny in *Goldberg* provided no indication of the decisionmaker's prime factual concerns in individual cases and thus did not permit recipients to shape their arguments to meet those concerns (*ibid.*). The risk of error in this situation was too great to permit the resolution of disputes on written submissions alone.

Here, as the court of appeals found, when a Social Security beneficiary requests reconsideration of an overpayment determination, the relevant inquiry is likely to be one "well suited to resolution by documentary proof" (App. A, *infra,* p. 24A). And although, when an overpaid beneficiary requests waiver of recovery, the decisive issues are likely to be more diffuse, this does not indicate that written submissions produce unreliable decisions.[13] The Secretary's re-

[13] The Court has indicated, moreover, that the making of subjective judgments (such as whether recoupment would be "unfair") are not "readily adapted to the procedural tools of judicial and administrative decisionmaking." *Board of Curators* v. *Horowitz*, No. 76-695, decided March 1, 1978, slip op. 11.

coupment procedures are calculated to apprise beneficiaries of the facts deemed pertinent by the decisionmaker and to enable beneficiaries to respond meaningfully to unfavorable initial findings. Specific forms are provided for reconsideration and waiver requests, and beneficiaries are guaranteed access to the files containing information on the overpayments they allegedly received. See 20 C.F.R. 401.3(a). Beneficiaries may submit whatever documentation they wish in support of their claims and they may consult with the appropriate Social Security district office concerning the reasons for the Secretary's overpayment or waiver determinations. In short, the Secretary's recoupment procedures contain ample safeguards against mistake.

This conclusion is supported by experience. The district court's order in *Buffington* was not stayed pending appeal. Accordingly, after an initial period of preparation during which no overpayments were recovered, the Secretary began to offer pre-recoupment evidentiary hearings. The first such hearings were held in January 1977. Approximately 1.25 million Social Security beneficiaries are overpaid annually. In calendar year 1977, 42,880 persons (3.4 percent of this group) requested waiver of recoupment. After initial or reconsidered waiver determinations made on the basis of written submissions, approximately 19,400 requests (45.3 percent) were granted.[14]

[14] The high rate of waiver grants after initial request or reconsideration belies the court of appeals' assertion that "most of the factors involved in a waiver determination are not capable of

Of the approximately 23,480 recipients whose waiver requests were denied, 1,282 (5.46 percent) sought a personal conference. Results of these hearings are not yet available. However, of 1,250 personal conferences held under the *Buffington* injunction (most of them requested in the period before 1977), 366 (29 percent) resulted in reversal of previous waiver denials. If the same rate of reversal persists, the personal conferences requested in 1977 will produce approximately 375 grants of waiver. Thus, of the 1.25 million persons whom the Secretary initially concludes have been overpaid each year, approximately 375 (1.6 percent of those who were denied waiver following written proceedings of the sort the Secretary supplied before the *Buffington* injunction, and 0.03 percent of those whose payments are recouped) would obtain a different result under a pre-recoupment oral hearing procedure. Perhaps the most noteworthy statistics are the low percentage of those overpaid who seek waiver and the low percentage of those denied waiver who seek an oral hearing. The error rate certainly compares favorably with that discussed by this Court in *Eldridge* (424 U.S. at 346–347 and n. 29).

(iii) The last of the three factors listed in *Eldridge* is "the public interest," particularly "the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to" a deprivation of benefits (424 U.S. at 347). Admitting the difficulty of predicting the magnitude of such increased costs, the Court declared that "experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial" (*ibid.*).

The evidentiary hearings ordered by the court of appeals have imposed significant new costs on the administration of the Social Security program. The Secretary estimates that the direct cost of conducting 1,200 oral hearings annually is $100,000. This does not include losses incurred because of inability to recover overpayments after a prolonged pre-recoupment period (during which the recipient may have died or become ineligible for some other reason). It also does not include the loss of interest on overpaid funds whose recovery is delayed due to the hearing requirements. The expense of establishing and maintaining a personal conference system with trained staff is another cost that must be added. And, perhaps, most importantly, the Secretary's estimate does not include the costs of delay introduced elsewhere in the administrative process, as scarce resources are devoted to hearings in recoupment cases. The delay hurts both applicants for new benefits and existing beneficiaries when the unavailability of staff prevents the processing of new claims and post-entitlement actions.

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resolution by written submissions" (App. A, *infra*, p. 30a). This Court has said that a similar reversal rate in the context of the Social Security disability program "attests to the fairness of the system and refutes the implication of impropriety." *Richardson* v. *Perales*, 402 U.S. 389, 410.

Moreover, there is a significant possibility that the number of oral hearings will increase as Social Security recipients themselves increase in number and become more familiar with the available procedures. That possibility could extend beyond recoupment cases. To the extent this case represents the court of appeals' judgment that other beneficiaries also are entitled to pre-action hearings, Social Security recipients facing termination or suspension of benefits may well claim entitlement to an evidentiary hearing before adverse administrative action, on the ground that *Eldridge* is limited to medical disability cases. If the scope of *Eldridge* were so restricted, a substantial increase in the number of pre-deprivation hearings could be expected.

2. The court of appeals held (App. A, *infra,* pp. 10A–15A) that the district courts had jurisdiction of these cases under 28 U.S.C. 1361, the mandamus statute, and that Section 1361 authorized the grant of class-wide relief to all persons who might be affected by the Secretary's practices. In so doing, the court exceeded the jurisdiction that has been granted by Congress.

Weinberger v. *Salfi,* 422 U.S. 749, 757, held that the district courts do not have jurisdiction to adjudicate claims, such as respondents', arising under Title II of the Social Security Act, "save as provided [by Section 205(g) of] the Act," 42 U.S.C. 405(g). It therefore held that class relief was impermissible, because only the persons who satisfied the require-

ments of Section 205(g), including the filing of a claim with the Secretary, could receive judicial relief. In *Califano* v. *Sanders,* 430 U.S. 99, the Court reiterated that, unless review is available under Section 205(g), it is not available at all. The court of appeals therefore erred in holding that district courts may assume jurisdiction under 28 U.S.C. 1361. Other courts have recognized that to assume jurisdiction under Section 1361 as a catch-all is effectively to disregard the limitations on judicial review consciously designed by Congress. See, *e.g., Association of American Medical Colleges* v. *Califano,* 569 F. 2d 101 (C.A. D.C.) (collecting cases).

We do not argue here, however, that the district courts were without jurisdiction to adjudicate the claims of the named respondents. The Court held in *Eldridge* that the only mandatory jurisdictional requirement under Section 205(g) is the filing of a claim with the Secretary, and that, although exhaustion of administrative remedies ordinarily is a precondition to judicial review, exhaustion is unnecessary when there is a colorable constitutional claim entirely collateral to the merits of the statutory entitlement to benefits.[15] The named respondents here all filed claims seeking to avoid recoupment, and under the principles of *Eldridge,* the district courts could properly adjudicate their individual cases.

The courts were not entitled, however, to grant relief to other persons. The relief in these cases is

[15] See also *Mathews* v. *Diaz,* 426 U.S. 67, 74–77.

improper for three separate reasons. First, relief was granted to persons who were not before the court. Second, the class included persons who have not filed any claim with the Secretary and therefore have not met the jurisdictional requirement of Section 205(g). Third, the class in *Buffington* is nationwide.

The first of these problems is before the Court in *Califano* v. *Aznavorian,* No. 77–991, probable jurisdiction noted, March 20, 1978. If the Court agrees with our argument in *Aznavorian,* it should reverse the grants of class relief here.[16] If the Court decides *Aznavorian* without considering the class action issue, it may resolve that important question in these cases.

The second of the problems has been addressed by this Court before. *Weinberger* v. *Salfi, supra,* necessarily held that class relief is impermissible unless each member of the class satisfies the requirements of Section 205(g). Lower courts, however, continue to grant class relief if at least one member of the

[16] See also *Jablon* v. *Secretary of Health, Education, and Welfare*, 399 F. Supp. 118, 123–124 (D. Md.), summarily affirmed *sub nom. Jablon* v. *Califano*, 430 U.S. 924. We discuss at pages 19–25 of our brief in *Norton* v. *Mathews*, 427 U.S. 524, the reasons why Section 205(g) does not authorize a court to grant injunctive relief. If our argument is correct (and the Court did not pass on that argument in *Norton*), it must follow that class-wide injunctions are unauthorized. In our view, Section 205(g) reveals a clear congressional intent to confine judicial relief to awards of money in particular cases. (We have furnished copies of our jurisdictional statement in *Aznavorian* and our brief in *Norton* to counsel for respondents.)

class satisfies the jurisdictional requirement. See, *e.g., Liberty Alliance of the Blind* v. *Califano,* 568 F. 2d 333 (C.A. 3); *Johnson* v. *Mathews,* 539 F. 2d 1111 (C.A. 8); *Jimenez* v. *Weinberger,* 523 F. 2d 689 (C.A. 7), certiorari denied, 427 U.S. 912. If a class action is permissible, the scope of the class is an important question that should be considered by this Court.

The third problem is before the Court in *Califano* v. *Mandley,* No. 76–1416, argued November 30, 1977 (with *Quern* v. *Mandley,* No. 76–1159). We have argued in *Mandley* that the certification of nationwide classes precludes the reasoned consideration of a difficult legal problem by more than one court. The first case to reach decision forecloses the opportunity for further debate. Moreover, the sweeping effect of a nationwide injunction may force this Court to undertake premature review of a problem without the benefit of the views of more than one lower court.[17] The arguments we have made in *Mandley* are applicable here as well.[18]

[17] See *E. I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n. 26.

[18] We have furnished copies of our brief in *Mandley* to counsel for respondents.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1978.

APPENDIX A

EVELYN ELLIOTT AND BENITO MOLINA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARILY SITUATED, PLAINTIFFS-APPELLEES

v.

CASPAR W. WEINBERGER, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AND SUNG DAI SEU, INDIVIDUALLY AND IN HIS CAPACITY AS PACIFIC AREA MANAGER, SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DEFENDANTS-APPELLANTS

FANNIE BUFFINGTON AND FRANCES BINER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

v.

CASPAR W. WEINBERGER, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, DEFENDANT-APPELLANT

Nos. 74–1611, 74–3118
United States Court of Appeals, Ninth Circuit
July 1, 1977
Rehearing and Rehearing In Banc Denied
Dec. 15, 1977.

Before BROWNING and TRASK, *Circuit Judges,* and WILLIAMS,[1] *District Judge.*

[1] Honorable Spencer Williams, United States District Judge, Northern District of California, sitting by designation.

SPENCER WILLIAMS, *District Judge*:

These consolidated appeals by the Secretary of the Department of Health, Education, and Welfare (hereinafter refered to as the "Secretary") challenge the judgments of two district courts requiring, *inter alia,* the Secretary to provide old-age and disabled social security beneficiaries the right to a hearing prior to the initiation of procedures to recoup monies paid to such beneficiaries allegedly in excess of their legal monthly entitlements. In both these class action suits plaintiffs-appellees assert that the procedures utilized by the Secretary in recouping excess payments denied them due process of law under the fifth amendment because their benefits were reduced or suspended without adequate notice of the reason for the recoupment, without adequate notice of their right to reconsideration, waiver, or partial adjustment of the Secretary's recoupment decision, and without affording them the opportunity to have a pre-recoupment hearing. *Elliott* v. *Weinberger,* 371 F. Supp. 960, 964 (D. Haw. 1974); *Buffington* v. *Weinberger,* Civil No. 734–73C2 (W.D. Wash., Oct. 22, 1974). The district courts held that mandamus jurisdiction was established under 28 U.S.C. § 1361,[2] and that the recoupment procedures violated the due process rights of the com-

[2] In *Elliott* v. *Weinberger*, plaintiffs asserted that jurisdiction additionally existed under 28 U.S.C. § 1331(a) and 5 U.S.C. § 701 *et seq.* The court in *Elliott*, however, expressly declined to decide whether jurisdiction could be properly predicated upon these sections, but noted in passing that support existed for either jurisdictional base. In *Buffington* v. *Weinberger*, the court found both § 1361 and § 701 *et seq.* to furnish the necessary jurisdictional basis. The Supreme Court recently held in *Califano* v. *Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L.Ed.2d 192 (1977) that § 10 of the Administrative Procedure Act, 5 U.S.C. §§ 701–706 does not provide an independent basis for jurisdiction.

plaining recipients. In addition, the courts ordered that prior to recoupment the Secretary must give the recipients adequate notice of their right to request and be afforded a hearing. We are in substantial agreement with the rulings of the courts below that a prior oral hearing ought to be afforded recipients prior to recoupment of their monthly benefits when they claim a waiver. However, we do not believe that such a hearing is constitutionally compelled in straight reconsideration cases, in light of *Mathews* v. *Eldridge,* 424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), unless the issues raised in a recipient's request for reconsideration of the Secretary's initial overpayment and recoupment determination are incapable of resolution upon written submission and/or documentary proof.

THE STATUTORY AND PROCEDURAL BACKGROUND

The Social Security Act vests the Secretary with the power to recover lost funds in the event overpayments are made to recipients of old-age or disability benefits. 42 U.S.C. § 404 provides in pertinent part:

> (a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:
>
> (1) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to

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his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. * * *

(b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

The challenged government procedures are as follows: As of January 1, 1974,[3] all recipients subject to recoupment receive form letters which set forth the reasons for the proposed recoupment, the availability of reconsideration (when a recipient asks for reconsideration, the correctness of the overpayment determination itself is being challenged), the condition for waiver (when a beneficiary requests that his overpayment be waived, he is, in effect, conceding the debt but asking that it be forgiven or reduced[4]), and the

[3] At the time these suits were filed, those beneficiaries whose overpayments were determined from their "annual earnings reports" were not entitled to advance notice of recoupment. Rather, recoupment began immediately, subject to later consideration of the beneficiary's request for reconsideration or waiver. Plaintiffs Silva, Ortiz, Vaquilar, Biner and Buffington all had recoupment procedures initiated against them on the basis of earnings reports filed with the Secretary. Following January 1, 1974 it has been the Secretary's practice to provide all such beneficiaries the same pre-recoupment notices as in other overpayment cases.

[4] It should be logically possible to request both reconsideration and waiver in the alternative. A claimant could dispute that overpayment occurred and claim further that even if an overpayment did occur, he was not at fault.

need to consult the local Administration office within thirty days if they wish to complain.[5]

The initial overpayment and recoupment notice sent to beneficiaries makes no mention of the forms needed for reconsideration or waiver, nor sets forth information about how to complete them. However, the beneficiary may obtain review of his case by sending a letter stating his reasons for opposing the overpayment determination or seeking a waiver.

It is the Secretary's policy to immediately defer recoupment action upon receipt of a request for reconsideration or waiver. Claims Manual § 5503.5. Deferral of recoupment beyond thirty days after the date of initial notice, however, lies completely within the discretion of the Administration.

If, after review of the information supplied by the beneficiary, the Secretary adheres to his initial determination that recoupment is appropriate, he notifies the beneficiary to this effect and resumes the withholding of benefits to satisfy the overpayment. If dissatisfied with this decision, the beneficiary may request an administrative hearing *de novo,* in which the beneficiary is provided an opportunity to present oral testimony and to cross-examine witnesses before an independent hearing examiner. 20 C.F.R. § 404.928–.929. However, recoupment is not suspended pending

[5] Social Security Claims Manual § 5503(a) requires the Secretary to inform overpaid beneficiaries of their "right to request reconsideration" and of the applicable waiver provisions of the Social Security Act. Contrary to the Secretary's contention, the form letter notice does not apprise a beneficiary of his "right" to waiver consideration. Nor does the Claims Manual require such disclosure. Only the "provisions" of waiver need be revealed. Even as to reconsideration, the form letter fails to make clear that such re-appraisal is a matter of right rather than a mere possibility.

the outcome of this *de novo* hearing. The beneficiary is further entitled to appeal the hearing examiner's determination to the Appeals Council of the Social Security Administration (20 C.F.R. § 404.945), and to judicial review of the Appeals Council's decision pursuant to 42 U.S.C. § 405(g).

THE FACTS

In *Elliott,* plaintiffs Silva, Ortiz and Vaquilar (subclass one) were determined to have been overpaid by the Secretary based upon their own annual earnings reports. They all received the form letter indicating the reasons for the overpayment determination, the specific amount overpaid and the amount by which the recipient's subsequent benefit checks would be reduced or suspended altogether. These plaintiffs were additionally apprised of the possibility of reconsideration and the conditions of waiver. All of them contacted the Administration's local offices within thirty days of receipt of the letter. At the time the *Elliott* court rendered its decision, the Secretary had completed recoupment against two of these plaintiffs, but as to the other had deferred recoupment pending disposition of the suit.

Plaintiffs Elliott, Gaines and Yamasaki (subclass two) received notices more than thirty days before recoupment was to begin, which disclosed information similar to that contained in the notices sent to subclass one plaintiffs.[6] Plaintiff Elliott was notified that the overpayment determination was predicated upon "her receipt of both retirement and disability benefits when she was entitled to only disability benefits." *Elliott, supra* at 965. " Duplicate payments"

[6] For a discussion of the major difference see note 2 *supra.*

was the reason given Gaines for his overpayment. Plaintiff Yamasaki was told that "a processing error' caused an overpayment to be sent to her. All subclass two plaintiffs contacted their district office within thirty days after receipt of the overpayment notice. Recoupment against Elliott and Gaines was deferred pending resolution of this case, whereas recoupment against Yamasaki has been completed. *Elliott, supra* at 965–66.

The *Buffington* plaintiffs resemble subclass one in Elliott. Both Buffington and Biner are recipients of Social Security old-age benefits. Based on "annual earnings reports" submitted by plaintiffs, the Secretary determined that they had received overpayments of benefits, and consequently sought to recoup the overpayments from future benefits.[7]

In 1973 Mrs. Buffington was entitled in her own right to old-age Social Security benefits of $80.50 per month. Based upon her husband's earnings record, she was also entitled to wife's benefits of $15.70 a month, resulting in total monthly benefits of $96.20 (she actually was receiving $89.90 per month due to monthly Medicare deductions of $6.30). In September 1973, plaintiff's husband filed an annual earnings report which showed that he had received earnings in 1972 which exceeded the

[7] Pursuant to 42 U.S.C. § 403(b), deductions from Social Security benefits must be made when a beneficiary's earnings exceed the amount prescribed by statute. To determine whether deductions are appropriate in any given case, a beneficiary who earns more than the statutory maximum is required to file an "annual earnings report" which sets forth the amount of wages earned by the beneficiary during the preceding year. The Social Security application form, and certain pamphlets sent to beneficiaries, advise the claimants of the filing requirement.

statutory limit. Accordingly, the Secretary determined Mrs. Buffington to have been in receipt of a total overpayment of $78.60. Notice of the overpayment was sent to Mrs. Buffington on October 3, 1973, indicating that the overpayment would be withheld from her next benefit check. In early November she received a Social Security check in the amount of $11.30. Mrs. Buffington subsequently submitted a request for reconsideration to the local administrative office. On July 24, 1974 her request was denied and the original overpayment determination was sustained.

Mrs. Biner was found entitled to old-age social security benefits in November 1970. In November 1972, however, she notified her claims representative that she intended to cease working in December 1972.[8] The Social Security Administration in 1972 sent Mrs. Biner three checks in a total amount of $2,216.20, representing benefits for all of 1972.[9] However, the

[8] There is considerable dispute as to whether plaintiff Biner also informed the district office that her earnings would not exceed the statutory maximum in 1972. The Secretary contends that plaintiff represented to her claims representative that she would not have earnings above $1,680 for the year 1972, and that based upon this representation the Secretary issued Mrs. Biner $2,216.20 in excess benefit checks. Plaintiff Biner, on the other hand, claims that her purpose in contacting the local office was to ensure that she would begin receiving her benefits promptly after her retirement in December 1972, and, as such, would only have had cause to inform the office of the date of her retirement, not the amount of income she earned during 1972. In any event, she exceeded the earnings maximum in 1972—the year for which she received the benefit checks at issue here.

[9] It is unclear whether Mrs. Biner knew or should have had reason to know that these checks represented benefit payments for the year 1972. The Secretary contends that enclosed with at least the first check was a letter which indicated that the check was intended as back payment for 1972. Excerpts of this letter which are quoted in the affidavit of the Deputy Director of the Bureau of Retirement and Survivors Insurance of the Social Security Administration do not bear this out. On the other hand, Mrs. Biner asserts that no explanation whatsoever was furnished by the Administration articulating the purpose in its sending this check.

Administration subsequently discovered as a result of a cross check with her former employer, that she had earned income in excess of the statutory amount for 1972. Thereupon, the Secretary requested Mrs. Biner to file an annual earnings report, which she submitted on August 28, 1973; and it was upon this basis that the overpayment was determined.

In the latter part of September 1973, Mrs. Biner was notified that she had been overpaid, and, consequently, that her benefits would be suspended until the entire amount had been recouped. She was also supplied with a facsimile of the form letter referred to earlier. She received no benefit checks for October 1973. In mid-October 1973 Mrs. Biner received a letter from the Administration containing "waiver" forms which she was instructed to fill out and return to the distict office if she wished to do so. Mrs. Biner completed the forms and mailed them to the local office. However, submission of this request for waiver consideration did not halt recoupment proceedings. Moreover, on November 19, 1973 Mrs. Biner was informed that she was at fault in retaining the checks and, consequently, no waiver would be permitted. She was also informed that the original suspension of her benefits had been adjusted so that $50.00 per month would be withheld from her regular benefit payments.

During the latter part of 1973 Mrs. Biner twice requested reconsideration of the Secretary's overpay-

ment decision. Again, recoupment was not halted. On April 8, 1974, however, the Secretary adhered to his initial determination that recoupment was appropriate, and continued to deduct amounts from Mrs. Biner's susequent benefit checks. In late May or early June of that year, Mrs. Biner requested and was granted on October 21, 1974 an administrative hearing to review the propriety of the Secretary's recoupment decision. After oral hearings, the administrative law judge sustained the Secretary's decision.

MANDAMUS JURISDICTION UNDER 28 U.S.C. § 1361

The Secretary contends that the district courts erred in assuming jurisdiction over these cases pursuant to the federal mandamus statute, 28 U.S.C. § 1361. We disagree. For the reasons discussed below, we find this to be an appropriate case for mandamus jurisdiction.[10]

In *Knuckles* v. *Weinberger,* 511 F. 2d 1221 (9th Cir. 1975) and in *Workman* v. *Mitchell,* 502 F. 2d 1201 (9th Cir. 1974), this Circuit has held that man-

[10] We note that § 405(g) jurisdiction is also available for the named plaintiffs. *Mathews* v. *Eldridge*, 424 U.S. 319, 328–32, 96 S.Ct. 893, 47 L. Ed.2d 18 (1976). It was not addressed below, presumably because, prior to *Eldridge*, it was thought to be unavailable. There are some potential problems with the adequacy of § 405(g) jurisdiction in cases of this sort, which lead us to the conclusion that mandamus jurisdiction remains appropriate. It is not entirely clear that relief for the class is available under § 405(g) jurisdiction, because of the exhaustion problems for class members posed by *Weinberger* v. *Salfi*, 422 U.S. 749, 755, 764, 95 S.Ct. 2457, 45 L. Ed. 2d 522 (1975). Furthermore, there is some uncertainty whether district courts may issue injunctions applicable to a class under § 405(g) jurisdiction. *Id.* at 763 n. 8, 95 S.Ct. 2457. In light of the uncertainties in the adequacy of § 405(g) class relief, we think mandamus is appropriate.

damus lies both to compel compliance with due process requirements and to provide the court jurisdiction "to declare the due process requirements applicable to [the challenged] proceedings." *Workman, supra,* at 1206. Mandamus has traditionally been viewed as appropriate to compel officials to comply with the law when "the claim is clear and certain and the duty of the officer is ministerial and so plainly prescribed as to be free from doubt." *Jarrett* v. *Resor,* 426 F. 2d 213, 216 (9th Cir. 1970). There is no conflict between the *Knuckles* rule, which we re-affirm today, and the traditional limited scope of mandamus.[11]

The fact that the district courts were required to analyze the Secretary's procedures in light of the fifth amendment in order to rule on the appropriate form of notice and hearing, does not render the Secretary's duty so unclear as to be beyond the reach of mandamus "[O]nce the court interprets the law, the defendant's duty will be clear; the court is not telling the defendant how to exercise his discretion." *Knuckles, supra,* at 1222.

Thus the trial courts properly found jurisdiction. Here we are concerned with the *duty* of the Secretary to provide certain minimum due process notice and hearing opportunities to Social Security recipients subject to recoupment. *Frost* v. *Weinberger,* 515 F. 2d 57, 62 (2d Cir. 1975), *cert. denied,* 424 U.S. 958, 966 S. Ct. 1435, 47 L. Ed. 2d 364 (1976); *Martinez* v. *Richardson,* 472 F. 2d 1121, 1125–26 & n. 12 (10th Cir. 1973). It is a strict fifth amendment issue, and the

[11] Nor is there any conflict with *Baker* v. *Mathews*, 538 F. 2d 855 (9th Cir. 1976); and *RoAne* v. *Mathews*, 538 F. 2d 852 (9th Cir. 1976). Those cases did not involve due process claims, but involved non-constitutional claims for refunds, which like claims for benefits, should be addressed via § 405(g) only after exhaustion of administrative remedies.

question of discretion does not arise. The Secretary has either met his constitutional duty to provide a certain minimum, or he has not. He has no discretion to provide less than that constitutionally required.

Nor are the present suits precluded by 42 U.S.C. § 405(h) which controls judicial actions to recover benefits. *Weinberger* v. *Salfi*, 422 U.S. 749, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975) interprets § 405(h) to require that claims for benefits be asserted only through 42 U.S.C. § 405(g). The instant suits are quite different. They assert a constitutional right to due process notice and hearing when alleged overpayments are recouped. They are not claims for benefits. Nor would granting the relief sought result in an entitlement to benefits. The distinction between due process questions divorced from a claim for benefits and questions related to the merits of a benefits claim is a significant one, requiring considerably different treatment by the courts.[12] *See Eldridge, supra,* 424 U.S. at 329–332, 96 S. Ct. 893.

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[12] The recent case of *Califano* v. *Sanders*, 430 U.S. 99, 97 S. Ct. 980 51 L. Ed. 2d 192 (1977) does not persuade us otherwise. In distinguishing *Eldridge and Salfi* the Court in *Califano* included some dicta suggesting that if jurisdiction had not been found in those cases under § 405(g) the federal forum would have been closed to colorable constitutional claims:

"Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions. Furthermore, since federal-question jurisdiction under 28 U.S.C. § 1331 is precluded by § 205(h), *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 761, 95 S. Ct. 2457, a decision denying § 205(g) jurisdiction in *Salfi* or *Eldridge* would effectively have closed the federal forum to the adjudication of colorable constitutional claims. At 109, 97 S. Ct. at 986."

Unlike benefits cases wherein the purpose of the administrative process is served by requiring all actions to proceed through administrative review before appeal to the courts, questions of due process benefit little from administrative exhaustion. There is a need for prompt resolution of such questions, *Eldridge, supra,* 424 U.S. at 330, 96 S. Ct. 893, and they are typically beyond the competence of the Secretary to decide. On the contrary, the development and fine-tuning of notions of due process is peculiarly the province of the courts.

Thus, while the language of § 405(h) precludes "judicial action to recover on any claim arising under this subsection," [emphasis added] it simply does not address the question of due process. Unless the question sought to be litigated is within the express language of the limiting statute, there is no basis for concluding that Congress sought to limit or preclude

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While this could be read to imply that the Court was precluding mandamus jurisdiction for due process claims, there is no reason to do so. The question of § 1361 jurisdiction was not before the Court in *Califano*, and it had been specifically left open even after argument in *Eldridge*, 424 U.S. at 332, 96 S. Ct. 893, n. 12. Furthermore, the very next sentence in *Califano* leads us to believe that the Supreme Court was not sounding the death knell for mandamus jurisdiction by this dictum:

"Thus those cases merely adhered to the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence. *Id.*, 422 U.S. at 762, 95 S. Ct. [2457], 2465; *Johnson* v. *Robison*, 415 U.S. 361, 366–67, 94 S. Ct. 1160, 1165–66, 39 L. Ed. 2d 389 (1974). At 109, 97 S. Ct. at 986."

judicial review. *Salfi, supra,* 422 U.S. at 761–762, 95 S. Ct. 2457.[13]

Nor does any clear and convincing evidence exist that Congress intended to limit mandamus jurisdiction at all by § 405(h). Section 1361 did not exist when § 405(h) was enacted in 1935 precluding jurisdiction under section 41 of Title 28 for recovery of Social Security claims.[14] In at least one other instance

[13] In *Salfi* the claimants argued that their position paralleled that of the claimants in *Johnson* v. *Robison*, 415 U.S. 361, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974), wherein the Court found jurisdiction under the analogous Veterans' Administration statute, 38 U.S.C. § 211(a). But *Salfi* pointed out that § 211(a) precludes review only of decisions of the Veterans' Administration, and the question raised in *Johnson* did not involve a decision, and thus was not precluded by that statute. It went on to say that the Social Security section at issue, § 405(h), has a broader preclusionary reach which is not limited to decisions only, but "extends to any 'action' seeking to recover on any [Social Security] claim," thus precluding Salfi's action for benefits. *Salfi, supra,* 422 U.S. at 761–762, 95 S. Ct. at 2465. Thus, the Court has indicated that the proper interpretation of statutes limiting judicial review of agency actions is a strict one, excluding only those matters expressly addressed by the statute. Since § 405(h) addresses only those actions brought "to recover on any claim" it does not preclude the instant suits, which are not for recovery of benefits.

The Tenth Circuit has also concluded that *Salfi* does not bar mandamus jurisdiction in this type of case. *Ryan* v. *Shea*, 525 F. 2d 268, 272 (10th Cir. 1975). *Cf., Humana of South Carolina, Inc.* v. *Mathews*, 419 F. Supp. 253, 256–258 (D.D.C. 1976).

[14] 42 U.S.C. § 405(h): "The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

where Congress intended a statutory limitation to encompass § 1361, a specific amendment to the limiting statute was made.[15]

THE CLASS ACTION

The district court in *Elliott* certified two subclasses of Hawaiian residents: 1) old-age beneficiaries subject to recoupment as a result of their own annual income reports, and 2) old-age and disability beneficiaries subject to recoupment for all other reasons. Each subclass was represented by named plaintiffs. The court ordered (a) the posting of a notice in every local social security office; (b) the publishing of an advertisement in a non-legal section of two newspapers of general circulation; and (c) the inclusion of a notice of the suit in every letter from the Administration informing the recipients of its overpayment determination. The notice informed the members of the class of the pendency of the suit, of their right to intervene, and

When § 405(h) was enacted in 1935, section 41 of Title 28 contained all of that title's grants of jurisdiction to district courts, including § 1331's predecessor. *See* 28 U.S.C. § 41(1) (1940). It did not contain any grant to federal courts to entertain actions in the nature of mandamus. It was not until 1962 when Congress, in enacting § 1361, extended to all federal courts jurisdiction to hear suits seeking mandamus relief—such jurisdiction prior thereto reposed only in the federal courts of the District of Columbia. Thus, § 1361 actions cannot be considered precluded under § 405(h) simply because § 1361 did not exist when § 405(h) was enacted. One might argue that Congress intended all further additions to Title 28's grants of jurisdiction to be, by the mere statutory location of those additions, subsumed within the proscription of § 405(h). However, no such congressional intent is anywhere evidenced.

[15] 38 U.S.C. § 211(a) (1970), *amending* 38 U.S.C. § 211(a) (1958); 2 U.S. Code Cong. & Admin. News, at 3729–31 (1970).

of their right to question the adequacy of their representation. The government takes no issue with the *Elliott* court's class certification order or with the adequacy of the notice provided.

The *Buffington* court certified the two named plaintiffs as representatives of a nation-wide class of persons eligible for social security old-age and survivors' benefits under 42 U.S.C. § 402 "whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing." The court excepted from the class residents of Hawaii and the Eastern District of Pennsylvania and those individuals involved in other litigation challenging the Secretary's procedures in recouping benefits without prior notice and hearing. No notice was provided members of the certified class.

The Secretary contends that the failure to provide notice to the class was a violation of due process and that the class order must be declared invalid, reducing the effect of the judgment solely to the two individuals named as plaintiffs. The Secretary further argues that the district court abused its discretion in certifying a nation-wide class. We disagree.

There is little doubt that the district court's certification order satisfied the terms of Fed.Rule of Civ.Proc., Rule 23(c) (1) and (3). Furthermore, contrary to the Secretary's suggestion, this action is plainly of the type described in Rule 23(b)(2), not 23(b)(3). Although plaintiffs sought recovery of monies recouped from their monthly benefit checks, their primary purpose in bringing this action is to enjoin the Secretary from recouping such sums without providing social security beneficiaries a preceding hearing. In short, pecuniary recovery is purely incidental to this suit's principal purpose, and consequently this action is properly certifiable under 23(b)(2). *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971).[16] In any event, the *Buffington* court's judgment did not award plaintiffs damages.

The Secretary contends that the *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1971) notice requirement should be extended to cover all class actions, including (b)(2) class actions. However, even the Eisen Court acknowledged that the notice requirements of subdivision (c)(2) are inapplicable to (b)(2) class actions. *Id.* at 177 n. 14, 94 S. Ct. 2140. Rather, Rule 23(d)(2) operates to make notice discretionary with the court in (b)(2) actions. The weight of authority supports the interpretation that due process does not require notice in every (b)(2) class action.[17] Only when necessary to

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[16] In this respect these suits resemble Title VII class actions. Back pay awards are simply part of the equitable relief available in conjunction with the primary injunctive relief to eliminate race or sex discrimination. *E.E.O.C.* v. *Detroit Edison Co.*, 515 F. 2d 301, 308 (6th Cir. 1975), appeal pending.

[17] *See United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F. 2d 826, 878 (5th Cir. 1975), cert. denied, 425 U.S. 944, 96 S. Ct. 1684, 48 L. Ed. 2d 187 (1976); *Frost* v. *Weinberger*, 515 F. 2d 57, 65 (2d Cir. 1975), cert. denied, 424 U.S. 958, 96 S. Ct. 1435, 47 L. Ed. 2d 364 (1976); *Katz* v. *Carte Blanche Corp.*, 496 F. 2d 747, 756 (3d Cir. 1974), cert. denied, 419 U.S. 885, 95 S. Ct. 152, 42 L. Ed. 2d 125 (1974); *Yaffe* v. *Powers*, 454 F. 2d 1362, 1366 (1st Cir. 1971); *American Financial System, Inc.* v. *Harlow*, 65 F.R.D. 94, 111 (D. Md. 1974); *Woodward* v. *Rogers*, 344 F. Supp. 974, 980, n. 10 (D. D. C. 1972), aff'd. 159 U.S. App. D.C. 57, 486 F. 2d 1317 (1973); *Johnson* v. *City of Baton Rouge, La.*, 50 F.R.D. 295, 299 (E. D. La. 1970); *Northern Natural Gas Co.* v. *Grounds*, 292 F. Supp. 619, 636 (D. Kan. 1968); 3B Moore's Fed. Prac. ¶ 23.55, at 23–1152; 7A Wright & Miller, Fed. Pract. & Proc., Civil § 1786 (1973) [notice not required in (b)(2) action]. *Contra, Schrader* v.

provide class members an opportunity to signify whether representation by named plaintiffs is fair and adequate or to intervene to present additional claims or to otherwise come into the action to, for example, submit views as *amici curiae,* does due process require the direction of some sort of notice to absent members of a (b)(2) class. In the instant case no such special circumstances exist to impel us to overturn the *Buffington* court's decision not to provide notice.

Plaintiffs here are represented by skilled and experienced counsel. Their record here and at the district court level is testimony to this commendation. When, as here, absent members' interests are adequately assured of being represented, no significant factual dispute is in need of resolution, the only issues raised are constitutional, and there is no serious question as to the competency of counsel, notice to the class serves no apparent purposes. *Lynch* v. *Household Fin. Corp.,* 360 F. Supp. 720 (D. Conn. 1973); *Woodward* v. *Rogers,* 344 F. Supp. 974, at 980 n.10 (D.D.C.1972). The presentation of additional individual claims would have complicated the suit and protracted it to the detriment of the class as a whole. The named plaintiffs' claims are typical of the class, and additional plaintiffs are unnecessary. The constitutional issues involved in the suit have been exhaustively briefed by counsel, thus rendering additional supplementation by absent members as *amici curiae* superfluous, *Watson* v. *Branch County Bank,* 380 F. Supp. 945, 960 (W.D. Mich. 1974). For all intents and purposes, the class

Selective Service Sys. Loc. Bd. No. 76, 470 F. 2d 73, 75 (7th Cir. 1972), cert. denied, 409 U.S. 1085, 93 S. Ct. 689, 34 L. Ed. 2d 672 (1972); *Zeilstra* v. *Tarr*, 466 F. 2d 111, 113 (6th Cir. 1972) [notice required].

members of the instant class have received their functional equivalent to a day in court.[18]

The Secretary's claim that the *Buffington* court abused its discretion in certifying a nation-wide class is similarly unpersuasive. In reviewing the designation of a class by the trial judge the appellate court should allow the broadest discretion. *City of New York* v. *International Pipe & Ceramics Corp.,* 410 F. 2d 295 (2d Cir. 1969). Furthermore, nothing in Rule 23 indicates that a class should not be designated because it is too large. Certification of a national class action is not unknown in the federal courts. See *Woodward* v. *Rogers, supra.* The Secretary does not cite, nor can we find, any authority which supports his rather novel theory limiting (b)(2) class actions because of their numerosity and manageability problems. By its terms, Rule 23 makes manageability an issue important only in determining the propriety of certifying an action as a (b)(3), not a (b)(2), class action. There are simply no manageability problems in these suits.

In short, the *Buffington* suit strikes us as the classic type of action envisioned by the drafters of Rule 23 to

[18] That Buffington's class determination forecloses absent members from bringing individual suits thereafter, in and of itself is not a factor militating against certification of a (b)(2) class action. If it were otherwise, no class actions could ever be certified under (b)(2). This is so because in (b)(2) actions absent members, regardless whether they receive notice or not, cannot excuse themselves from the litigation or avoid *res judicata* effects of the judgment entered therein. *Compare Air Line Stew.* v. *American Airlines, Inc., supra*, 490 F. 2d 636, 642 (7th Cir. 1973) with *Schrader* v. *Selective Service Sys. Loc. Bd. No. 76, supra*, 470 F. 2d at 75. Indeed, (b)(2) actions are generally preferred for their wider *res judicata* effects. *Bing* v. *Roadway Express, Inc.*, 485 F. 2d 441, 447 (5th Cir. 1973).

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be brought under subdivision (b)(2). The Secretary has acted on grounds generally applicable to all members of the class and final injunctive and declaratory relief with respect to the whole class is appropriate. It would be a practical absurdity were the Secretary to provide the due process safeguards enunciated herein to the exclusion of all save the named plaintiffs. Multiplicity of actions based on the same constitutional claims advanced here would inevitably result. Obviating such unnecessary duplication is the very purpose for which Rule 23(b)(2) was designed. Maintenance of the instant case as a class action is not only proper, but it also will effectuate the interests both of judicial administration and of justice.

THE REQUIREMENTS OF DUE PROCESS

Social Security beneficiaries whose old-age or disability payments are subject to suspension or reduction under the Secretary's recoupment procedures have a right to due process. Plaintiffs' interest in their monthly benefits amounts to a statutory entitlement constituting a property interest protected under the due process clause of the fifth amendment. *Mathews* v. *Eldridge,* 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Goss* v. *Lopez,* 419 U.S. 565, 573, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975); *Board of Regents* v. *Roth,* 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); 42 U.S.C. § 401 *et seq.*[19] A

[19] The Secretary contends that when a recipient seeks a waiver, he has no property interest in the amounts overpaid deserving of due process protection. This argument is untenable.

A Social Security recipient has a statutory right to waiver if he is without fault and is financially dependent on the benefits, or has detrimentally relied on the overpayment. Waiver is not a matter of "government beneficence," as the Secretary puts it. Under

suspension or reduction in old-age or disability benefits imposed by a recoupment is not a *de minimis* deprivation outside the protection of due process. *See Goss, supra* (wherein the Court found a 10-day suspension from school not to be *de minimis*). Therefore, they may be deprived of their full benefits only through procedures according them due process of law.

More difficult, however, is determining the form of process to which plaintiffs are due. The Supreme Court set out a three part test for determining the specific dictates of due process in *Mathews* v. *Eldridge, supra,* 424 U.S. at 335, 96 S. Ct. at 903;

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *See, e.g., Gold-*

§ 404(b) waiver is not discretionary, but mandatory, under the conditions specified. Thus, the statute creates a property interest in retention of overpayments if the conditions of waiver are met, even if there was no right to receive the overpayments in the first place. That property interest commands due process protection. As the Supreme Court observed in *Roth, supra,* 408 U.S. at 577, 92 S. Ct. at 2709, "[T]he welfare recipients in *Goldberg* v. *Kelly, supra,* had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they migh attempt to do so."

berg v. *Kelly, supra,* 397 U.S. at 263–271, 90 S. Ct. [1011], 1018–1022.

Our analysis must apply the foregoing test to the facts of the instant cases, guided by the factual characteristics of welfare terminations, *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970), and disability insurance terminations, *Eldridge, supra.*

I. THE PRIVATE INTEREST

As in both *Goldberg* and *Eldridge* the plaintiffs' sole interest is in the uninterrupted receipt of benefits pending final administrative decision on his claim. *Eldridge, supra,* 424 U.S. at 340, 96 S. Ct. 893. However, as *Eldridge* indicated, the strength of the interest in the ~~recipient~~ RECEIPT of benefits is a key factor in determining whether a prior oral hearing is necessary. *Eldridge* found that the interest of a disability insurance recipient in his benefits is less strong than that of the *Goldberg* welfare recipient. The Court reasoned that whereas welfare is the last step before complete destitution, disability benefits are not, since a terminated disability recipient who is impoverished could resort to welfare. Therefore, the disability recipient's interest requires less rigorous due process protections, since the potential deprivation is not so extreme. *Eldridge* also based its conclusion on the fact that the disability insurance program is not need-based, so erroneous termination would not necessarily cause financial disaster. Hence, the Court in *Eldridge* found that the personal interest of disability insurance recipients did not in itself invoke the need for a pre-termination hearing.

We find that the strength of the interest of the plaintiffs in the present cases lies somewhere between

Eldridge and *Goldberg.* Although the old-age and survivors program is partially need-based,[20] the victims of erroneous recoupment generally can resort to welfare if in financial need.[21] Standing alone, this falls short of compelling an oral pre-recoupment hearing.

II. RISK OF ERRONEOUS DEPRIVATION

The next factor to be considered is "the fairness and reliability of the existing pre[recoupment] procedures, and the probable value, if any, of additional procedural safeguards." *Eldridge, supra,* 424 U.S. at 343, 96 S. Ct. at 907. In analyzing the risk of erroneous deprivation of the private interest caused by the Secretary's recoupment procedure we must look at the type of question the procedure is required to answer. There are two separate ways to dispute recoupment: reconsideration and waiver. Each involves different

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[20] Unlike the disability insurance program, which is not need-related, the old-age and survivors benefits program is need-based insofar as benefits are reduced by a large percentage of any income to the recipient above a very low exemption. This "tax" on non-exempt income is similar to many welfare systems which put a high tax on earned income by reducing welfare benefits by a corresponding high percentage of the earnings.

Nevertheless, both programs are governed by the same code sections, and it is difficult to imagine that persons subject to a reduction in benefits under one program should have a greater interest than one subject to complete termination in a related program. In the absence of a showing that the welfare available to terminated disability recipients is not available to impoverished old-age and survivors recipients, we can not say the plaintiffs in the instant case have a personal interest more like *Goldberg* than *Eldridge.*

[21] However, under certain limited circumstances, the Social Security program may be the "last step", raising the interest to the *Goldberg* level. See discussion *infra* at 1233–1234.

types of questions. Due process requires a procedure which provides notice and an "effective means for the recipient to communicate his case to the decision-maker." *Eldridge, supra,* 424 U.S. at 345, 96 S. Ct. at 907; *Goldberg, supra,* 397 U.S. at 269, 90 St. Ct. 1011.

A. *Reconsideration*

A reconsideration request addresses the question of whether an overpayment actually occurred. The reconsideration determinations here involve questions which, like the questions in *Eldridge,* are well suited to resolution by documentary proof, e.g., arithmetic computations when amounts are in controversy, and cancelled checks when the receipt of a payment is in dispute. Because written submissions are adequate to effectively communicate these matters, there is no undue risk of erroneous deprivation caused by the present procedures. Therefore, *Eldridge* dictates that the reconsideration claimants here are not constitutionally entitled to a prior oral hearing.[22]

We decline however to rule that reconsideration requests would never require prior oral hearings, for it is conceivable that cases may arise in which the credibility of the claimant may be determinative of the outcome. If a reconsideration claim raises such an issue, the claimant should be entitled to an oral pre-recoupment hearing.

B. *Waiver*

Section 404(b) requires the Secretary to waive recoupment on request of a claimant who is without fault in the overpayment if the recoupment will defeat the purpose of the subchapter or be against equity and good conscience.

[22] Plaintiffs have not attempted, in light of *Eldridge*, to argue that reconsideration cases generally require a prior oral hearing, despite the trial court's ruling in their favor on this point.

The questions raised in a waiver determination are fault, financial dependence, and detrimental reliance. These are significantly different from those faced in the disability insurance termination in *Eldridge,* and more closely resemble those addressed in *Goldberg.*

The question to be answered in a disability insurance hearing is whether the worker is unable to engage "in any substantial gainful activity by reason of any medically determinable physical or mental impairment * * *." The impairment claimed must be demonstrable by "medically acceptable clinical and laboratory diagnostic techniques" *Eldridge, supra,* 424 U.S. at 343, 96 S. Ct. at 907.

Furthermore, the pre-termination procedures in the disability insurance termination cases consist of extensive fact-finding aimed at establishing the medical condition of the claimant by relatively objective evidence. As the Supreme Court emphasized in *Eldridge,* the test for continued eligibility for disability benefits hinges on a medical assessment of the worker's physical or mental condition, which "[i]s a more sharply focused and easily documented decision than the typical determination of welfare entitlement." *Eldridge, supra,* 424 U.S. at 343, 96 S. Ct. at 907.

Finally, the sources of such information are typically able to communicate effectively through written documents, and the information to be conveyed is more amenable to written than to oral presentation in disability cases. *Id.,* at 345, 96 S. Ct. 893. The Court in *Eldridge* placed great weight on the fact that disability determinations turned largely on "routine, standard, and unbiased medical reports by physician

specialists." *Id.*, at 344, 96 S. Ct. at 907, rather than on questions of credibility and veracity, which render written submissions "a wholly unsatisfactory basis for decision." *Id.*, at 344, 96 S. Ct. at 907; *Goldberg, supra,* 397 U.S. at 269, 90 S. Ct. 1011.

In waiver determinations the trier of fact must address the question of fault, which rests peculiarly upon the credibility of the claimant and the other witnesses, and can not be ascertained solely from written submissions. As noted recently in *Pence v. Kleppe,* 529 F. 2d 135, 143 (9th Cir. 1976), "written documents do not allow the trier of fact to assess the demeanor and attitude of the various witnesses and thereby test their credibility." Unlike a disability determination, a decision of whether a person is at fault requires that the decisionmaker see the person, size up the testimony, and have an opportunity to question the individual about the circumstances involved in his claimed failure to recognize that an overpayment was made.

In determining fault in a waiver claim, the decisionmaker is required to evaluate the claimant's story in light of "all pertinent circumstances, including his age, intelligence, education, and physical and mental condition." 20 C.F.R. § 404.507. It is not plausible to expect the decisionmaker to make a judicious evaluation of the claimant's personal characteristics and circumstances merely from the file and submitted papers.

The fact situations in which the fault issue arises are varied and can be complex. An inquiry into the state of mind of the claimant is required to determine whether the events posited in 20 C.F.R. § 404.510 have occurred. Findings under this regulation hinge on such matters as reasonable belief, reliance, unawareness, lack of knowledge, and failure to understand.

In addition, § 404.511 states that an individual who has shown lack of good faith or has failed to exercise a high degree of care will not be "without fault." The care component of this determination is tempered by the recognition that the degree of care required may vary with the complexity of the circumstances by the capacity of the payee to realize that he is being overpaid, and by the requirement that the "variances in personal circumstances and situations of individual payees are to be considered in determining whether the necessary degree of care has been exercised * * *."

"The objective [of due process] is to ensure that the agency will acquire the information it should have in a manner fairly calculated to illuminate the issues for reasoned decision making." *City of Santa Clara, Cal.* v. *Kleppe,* 418 F. Supp. 1243, 1260 (N. D. Cal. 1976); *cf. Pence* v. *Kleppe,* 529 F. 2d 135, 140–143 (9th Cir. 1976). As the facts of plaintiff Biner's case graphically illustrate, these regulations can not be properly administered without an oral hearing. While the Administration conceded that Mrs. Biner may not have been at fault in receiving the overpayment checks in 1972, it nonetheless believed that the letter enclosed with the first check sent to Biner and the fact that she received checks while she was employed put her on notice that continued retention of those checks was improper and precluded a finding on its part that she was "without fault" within the meaning of the Social Security Act. However, whether Biner knew that she was not entitled to these checks seems to be a matter difficult to resolve without hearing her side of the story. Find-

ing fault on the basis of the ambiguous letter enclosed with the first overpayment check sent her, without giving her an opportunity to explain in person what she thought it meant, is simply inadequate.

Emerging from our analysis of the regulations under which § 404(b) is administered is the conclusion that the decision which must be reached in a fault determination is highly subjective, highly individualized, and highly dependent on the interaction between the intentions and state of mind of the claimant and the peculiar circumstances of his situation.[23]

Thus it is clear that the risk of erroneous deprivation is greatly increased by the present system which does not provide an adequate opportunity for the claimant to communicate his case to the decisionmaker on the issue of fault. Likewise, it is clear that an oral prerecoupment hearing would provide such an opportunity for resolving fault questions.

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[23] The Secretary seizes upon the fact that 20 C.F.R. § 404.507 utilizes the objective standard ("Knew or should have known") for determining fault rather than an entirely subjective one (actual knowledge being the sole determinant) in arguing that this standard precludes the need for an oral hearing. But this misconstrues the objective, or "reasonable person", test. The decisionmaker has to hear the claimant's story and perception of the facts in order to determine whether he should "should have known." To say that the decisionmaker need not hold a hearing, just because in some cases claimants will fail to meet their burden after testimony, is absurd. Since § 404.507 requires the reasonable person to be viewed in the claimant's own circumstances and with whatever mental and physical limitations the claimant might have, the claimant must be given an effective opportunity to communicate these characteristics to the decisionmaker. The very test which might permit a decision on documentary evidence alone as a matter of administrative law, is itself dependent upon information which can effectively be adduced only at an oral hearing.

The waiver determination is a two-step process. If the recipient establishes his lack of fault in receiving and retaining the overpayment, the Secretary must then determine whether recoupment would "defeat the purpose of the subchapter or be against equity and good conscience." 42 U.S.C. § 404(b).

The meaning of the phrase "defeat the purpose of this subchapter" is found in § 404.508 which defines it to mean depriving a person of income required for ordinary and necessary living expenses.

Generally, evidence of living expenses can be adequately presented by written and documentary submissions. Check stubs, copies of budgets, estimates of expenses, and the like can be communicated well in this form.

However, there is one exception which may come into play when the recipient claims financial dependence on the benefits. As discussed above, *Eldridge* did not require an oral hearing in light of financial need, on the assumption that one could go on welfare. As long as the termination or reduction is from a program which is not the "last step" then the personal interest standing alone can not compel a prior oral hearing. That is the general rule. But a situation may exist where a claimant is dependent on the Social Security benefits for existence and welfare is not available despite that person's severe financial need. In that situation only, Social Security becomes the "last step," and the strength of the personal interest becomes identical with *Goldberg*.

The other component of waiver is "equity and good conscience." It involves those situations where a person has relied on a payment or notice of payment, and has relinquished a valuable right or changed posi-

tion detrimentally as a result. Financial need is irrelevant to this component. 20 C.F.R. § 404.509. Deciding whether the recipient has detrimentally relied on an overpayment resembles the fault determination. The decisionmaker will have to answer the same types of questions as in the fault, context; e.g., state of mind, credibility, and whether under the circumstances the claimant would have changed position anyway without the overpayment. Purely documentary submissions are inadequate to show what motivation or set of operational facts the claimant considered in performing an act or refraining therefrom. Nor can they address the question of causality which a claim of reliance implies.

The above analysis indicates that most of the factors involved in a waiver determination are not capable of resolution by written submissions. Therefore, the Secretary's current procedure for handling waivers creates an undue likelihood of erroneous deprivation, which could be obviated by pre-recoupment oral hearings.

III. THE GOVERNMENT INTEREST

The final factor to be assessed is the public interest, which includes the administrative burdens associated with requiring an oral hearing prior to recoupment in waiver cases.

There is an understandable dispute as to the actual burden to be borne by the Secretary under a requirement of pre-recoupment oral hearings for waiver requests. No one can say with complete authority how many additional hearings will take place under the guidelines we set down today. A review of the record indicates on the negative side that there will be a modest increase in burden. On the positive side, however, it appears fairly certain that hearings should significantly reduce errors in the decision making process.

The major fiscal difficulty envisioned by the Secretary is the likelihood that the availability of pre-recoupment hearings will result in the filing of a far greater number of requests for reconsideration or waiver.

During oral argument counsel for the Secretary cited statistics that show that the number of hearings on termination of welfare benefits has increased from 19,000 per year to 68,000 per year since the decision of the Supreme Court in Goldberg. Without further clarification, these statistics are of little value. *Cf., Eldridge, supra,* 424 U.S. at 346, 96 S. Ct. 893. They do not disclose what change, if any, has taken place in the success rate of welfare beneficaries who receive a hearing. If the effect of *Goldberg* were to cause the filing of a large number of frivolous requests for hearings by people seeking to delay termination, there might be reason to question the wisdom of *Goldberg.* But if, in fact, the percentage of successful contests has remained constant or declined only slightly, then *Goldberg* has resulted in a large number of correct determinations of the issue of whether welfare benefits should be terminated, and, as such, *Goldberg* has benefited rather than burdened the system.

If requiring pre-recoupment hearings would result in the filing of frivolous requests in order to delay recoupment, the present procedure should also encourage frivolous written requests for reconsideration or waiver. This is so because the present practice of the Secretary is to delay recoupment until after a determination by the Department that the request should not be granted.

The findings of fact by the courts below strengthen our belief that the increased burden will be minimal. First, very few of the recoupment decisions of the Secretary are challenged in *any* way. Claimants object to less than 1% of the recoupments. Second, when they do object, a high percentage convince the Secretary to reverse himself. Almost three-fourths of the claimants who contest their recoupment win a favorable decision somewhere along the line, and more than one-third of those who reach the post-termination hearing succeed at that stage. *Elliott* v. *Weinberger*, 371 F. Supp. 9660, at 967.[24]

There has been no showing that the percentages of challenges will increase substantially or that the number of hearings will rise inordinately. There may be more requests for waiver and reconsideration when the Secretary's notices are redesigned to provide the information required to fulfill the due process notice requirements noted elsewhere in this opinion. There will also be some increase in hearings reflecting those claimants who would have given up or died before the post-recoupment hearings which under the current procedures are held almost one year after the fact.

Furthermore, the financial burden the Government bears in recoupment cases is substantially lighter than in a termination case. In the latter, as noted in *Eldridge, supra,* 424 U.S. at 348, 96 S. Ct. 893, the Government is forced to continue paying benefits to someone who not only may not be eligible for them, but who in all likelihood will be unable to repay them and may be judgment-proof in the event that he is found

[24] The trial court's figures referred to all disputes, without breaking down each category. Nevertheless, they are useful to show that the relatively few disputes which do occur are quite often meritorious.

ineligible for the amounts paid during the review and termination process.

In the instant case we merely require the Government to exercise a little forebearance before taking money from the claimants via recoupment. There will be few if any situations when payments will be made to ineligible persons during the course of the review. Generally, the claimant's eligibility is not at issue, the only question being whether, or when and how, his payments should be subject to temporary recoupment deductions.

THE ORAL PRE-RECOUPMENT HEARING

Applying the *Eldridge* three element balancing test to the instant cases we conclude that the reconsideration claimants here are not constitutionally entitled to a prior oral hearing.

We conclude from applying the *Eldridge* test to the waiver cases that § 404(b) determinations require an oral pre-recoupment hearing. The questions to be asked and the factors to be considered in a § 404(b) waiver determination can not be adequately handled by written submissions.[25]

The hearing need not take the form of a judicial or quasi-judicial trial. In accordance with *Goldberg* v. *Kelly, supra,* 397 U.S. at 267–71, 90 S. Ct. 1011, the claimant should be afforded the following rights:

1. to present his case orally and to submit evidence with witnesses or documents;
2. to cross-examine adverse witnesses;
3. to be represented by counsel;
4. to have an impartial hearing officer;

[25] This right however does not attach if the claimant raises no disputed fact. *See Mills* v. *Richardson*, 464 F. 2d 995, 1001 (2d Cir. 1972).

5. to receive a statement written by the hearing officer setting forth his decision and the reasons and evidence in support of it; and
6. to receive adequate notice.

NOTICE

Social Security recipients have a due process right to receive adequate notice of recoupment, plainly and clearly communicated. The notice should inform the recipient of the basis for the recoupment, the procedural rights available to the recipient, and the consequences if the recipient exercises those rights. Under present regulations, a notice informing a recipient of these matters might state:

1. the alleged overpayment and the reason for overpayment; [26]
2. the recipient's right to request reconsideration or waiver, or both, and the nature of each; [27]
3. that the recipient must request reconsideration or waiver in writing within thirty days of receipt of notice in order to exercise these rights;

[26] Like the district court in *Elliott* we have serious doubts as to the adequacy of the Secretary's summary explanation of some of its overpayment determinations as the result of "processing error." The strictures of due process would seem to compel a more elaborate description of the type of error which gave rise to the Secretary's determination in the first instance.

[27] It is important that the explanations of these two forms of relief be made *very* clear. Given the difficulty beneficiaries may have in figuring out whether they might qualify for a waiver, or reconsideration, or both in the alternative, and the subtleties which may inhere in determining which is appropriate and whether an oral hearing is required in any given situation, it may be prudent for the Secretary to furnish recipients with forms and additional information for *both* reconsideration and waiver when there is doubt as to which applies. This, however, is not a constitutional imperative.

4. that if waiver is requested, the recipient has a right to a pre-recoupment hearing (as set forth in this opinion);
5. that recoupment will begin unless reconsideration or waiver is requested, in which case recoupment will not begin until the request has been finally disposed of by way of the required review procedure;
6. that the Administration will send appropriate forms upon receipt of a request for reconsideration or waiver, and that the local office will assist the recipient in completing and submitting the forms upon request;
7. any other administrative relief available, and an explanation of how to request it.

The judgments of the district courts are affirmed in part and reversed in part, and the cases are remanded.

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APPENDIX B

United States Court of Appeals For the Ninth Circuit

(No. 74–1611)

EVELYN ELLIOTT AND BENITO MOLINA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

v.

CASPAR W. WEINBERGER, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, AND SUNG DAI SEU, INDIIVIDUALLY AND IN HIS CAPACITY AS PACIFIC AREA MANAGER, SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, DEFENDANTS-APPELLANTS

(No. 74–3118)

FANNIE BUFFINGTON AND FRANCES BINER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

v.

CASPAR W. WEINBERGER, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, DEFENDANTS-APPELLANTS

ORDER

Before: BROWNING and TRASK, *Circuit Judges,* and WILLIAMS,[1] *District Judge*

[1] Honorable Spencer Williams, United States District Judge for the Northern District of California, sitting by designation.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

[Filed: December 15, 1977; Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals]

APPENDIX C

United States Court of Appeals
For the Ninth Circuit

No. 74-1611

EVELYN ELLIOTT AND BENITO MOLINA, INDIVIDUALLY CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT PLAINTIFFS-APPELLEES

v.

CASPAR W. WEINBERGER, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE; AND SUNG DAI SEU, INDIVIDUALLY AND IN HIS CAPACITY AS PACIFIC AREA MANAGER, SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DEFENDANTS-APPELLANTS

Appeal from the United States District Court of the District of Hawaii (Honolulu).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in part and reversed in part.

[Filed: ~~December 15~~ JULY 1, 1977; Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals]

United States Court of Appeals
For the Ninth Circuit

No. 74-3118

FANNIE BUFFINGTON AND FRANCES BINER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES

v.

CASPAR W. WEINBERGER, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, DEFENDANTS-APPELLANTS

Appeal from the United States District Court for the Western District of Washington.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed in part and reversed in part.

[Filed: ~~December 15~~ JULY 1, 1977; Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals]

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1611

EVELYN ELLIOTT and BENITO MOLINA, Individually and on behalf of all others similarly situated,
PLAINTIFFS-APPELLEES

vs.

CASPAR W. WEINBERGER, Individually and in his capacity as Secretary, United States Department of Health, Education and Welfare; and SUNG DAI SEU, individually and in his capacity as Pacific Area Manager, Social Security Administration, Department of Health, Education and Welfare,
DEFENDANTS-APPELLANTS

No. 74-3118

FANNIE BUFFINGTON and FRANCES BINER, Individually and on behalf of all others similarly situated, PLAINTIFFS-APPELLEES

vs.

CASPAR WEINBERGER, Individually and in his capacity as Secretary of the Department of Health, Education and Welfare, DEFENDANTS-APPELLANTS

OPINION

[October 1, 1975]

74-1611, Appeal from the United States District Court for the District of Hawaii

74-3118, Appeal from the United States District Court for the Western District of Washington

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Before: BROWNING and TRASK, Circuit Judges, and WILLIAMS,* District Judge

WILLIAMS, District Judge:

These consolidated appeals by the Secretary of the Department of Health, Education and Welfare (hereinafter referred to as the "Secretary") challenge the judgments of two district courts requiring, *inter alia*, the Secretary to provide old-age and disabled social security beneficiaries the opportunity to request a hearing prior to the initiation of recoupment procedures, the purpose of such procedures being the recovery of monies paid to such beneficiaries allegedly in excess of their legal monthly entitlements. In both these class action suits plaintiffs-appellees asserted that the procedures utilized by the Secretary in recouping excess payments denied them due process of law under the fifth amendment because their benefits were reduced or suspended without adequate notice of the reason for the recoupment, without adequate notice of their right to reconsideration, waiver, or partial adjustment of the Secretary's recoupment de-

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* Honorable Spencer Williams, United States District Judge for the Northern District of California, sitting by designation.

cision, and without affording them the opportunity to have a pre-recoupment hearing. *Elliott* v. *Weinberger*, 371 F. Supp. 960, 964 (D. Haw. 1974); *Buffington* v. *Weinberger*, Civil No. 734-73C2 (W.D. Wash., Oct. 22, 1974). The district courts held that mandamus jurisdiction was established under 28 U.S.C. § 1361,[1] and that the recoupment procedures violated the due process rights of these complaining recipients. In addition to providing a hearing to any recipient who requested one, the Secretary was ordered to supply the recipients adequate notice informing them of their right to such a hearing, and the hearing, if requested, had to precede recoupment. While we are in substantial agreement with the general principle that a hearing must be afforded recipients prior to recoupment of their monthly benefits, we do not believe that such a hearing is constitutionally compelled unless the issues raised in a recipient's request for review of the Secretary's initial overpayment and recoupment determination are incapable of resolution upon written submission and/or documentary proof.

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[1] In *Elliott* v. *Weinberger*, plaintiffs asserted that jurisdiction additionally existed under 28 U.S.C. § 1331(a) and 5 U.S.C. § 701 *et seq.* The court in *Elliott*, however, expressly declined to decide whether jurisdiction could be properly predicated upon these sections, but noted in passing that support existed for either jurisdictional base. In *Buffington* v. *Weinberger*, the court found both § 1361 and § 701 *et seq.* to furnish the necessary jurisdictional basis.

The Statutory and Procedural Background

The Social Security Act vests the Secretary with the power to recover lost funds in the event overpayments are made to recipients of old-age or disability benefits. 42 U.S.C. § 404 provides in pertinent part:

> (a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:
>
> (1) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. . . .
>
> (b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

The challenged government procedures are as follows: As of January 1, 1974,[2] all recipients subject to recoupment receive, thirty days before actual recoupment begins, form letters which set forth the reasons for the proposed recoupment, the availability of reconsideration (when a recipient asks for reconsideration, the correctness of the overpayment determination itself is being challenged), the condition for waiver (when a beneficiary requests that his overpayment be waived, he is, in effect, conceding the debt but asking that it be forgiven or reduced), and the need to consult the local Administration office within thirty days if they wish to complain.[3]

[2] At the time these suits were filed, those beneficiaries whose overpayments were determined from their "annual earnings reports" were not entitled to advance notice of recoupment. Rather, recoupment began immediately, subject to later consideration of the beneficiary's request for reconsideration or waiver. Plaintiffs Silva, Ortez, Vaquilar, Biner and Buffington all had recoupment procedures initiated against them on the basis of earnings reports filed with the Secretary. Following January 1, 1974 it has been the Secretary's practice to provide all such beneficiaries the same pre-recoupment notice as in other overpayment cases.

[3] Social Security Claims Manual § 5503(a) requires the Secretary to inform overpaid beneficiaries of their "right to request reconsideration" and of the applicable waiver provisions of the Social Security Act. Contrary to the Secretary's contention, the form letter notice does not apprise a beneficiary of his "right" to waiver consideration. Nor does the Claims Manual require such disclosure. Only the "conditions" of waiver need be revealed. Even as to reconsideration, the form letter fails to make clear that such re-appraisal is a matter of right rather than a mere possibility.

The initial overpayment and recoupment notice sent to beneficiaries makes no mention of the forms needed for reconsideration or waiver, nor sets forth information about how to complete them. However, the beneficiary can obtain review of his case by setting forth, in a letter, the reasons why he opposes the overpayment determination or seeks waiver. When reconsideration or waiver consideration is required, the Administration's decision is based upon a claimant's *ex parte* presentation of documentary evidence offered in support of his claim for relief. No oral hearing is given prior to the commencement of recoupment.

Furthermore, it is the Secretary's policy to immediately defer recoupment action upon the filing of a request for reconsideration or waiver. Claims Manual § 5503(b), (c). Any deferral of recoupment beyond thirty days after the date of the initial notice lies completely within the discretion of the Administration. Although appellants claim that it is the Secretary's policy to defer recoupment indefinitely once a request for reconsideration or waiver has been filed (Claims Manual § 5503(c)), in plaintiff Biner's case social security checks were not forthcoming in either November or October of 1973, notwithstanding the fact that Biner filed a waiver request in mid-October 1973. Appellants attribute this oversight to administrative error.

If, after review of the information supplied by the beneficiary, the Secretary adheres to his initial determination that recoupment is appropriate, he noti-

fies the beneficiary to this effect and resumes the withholding of benefits to satisfy the overpayment. If dissatisfied with this decision, the beneficiary may request an administrative hearing *de novo*, in which the beneficiary is provided an opportunity to present oral testimony and to cross-examine witnesses before an independent hearing examiner. 20 C.F.R. § 404.928-.929. However, recoupment is not suspended pending the outcome of this *de novo* hearing. The beneficiary is further entitled to appeal the hearing examiner's determination to the Appeals Council of the Social Security Administration (20 C.F.R. § 404.945), and to judicial review of the Appeals Council's decision pursuant to 42 U.S.C. § 405(g).

The Facts

In *Elliott*, plaintiffs Silva, Ortiz and Vaquilar (subclass one) were determined to have been overpaid by the Secretary based upon their own annual earnings reports. They all received the form letter previously mentioned indicating the reasons for the overpayment determination, the specific amount overpaid and the amount by which the recipient's subsequent benefit checks would be reduced or suspended altogether. These plaintiffs were additionally apprised of the possibility of reconsideration and the conditions of waiver. All of them contacted the Administration's local offices within thirty days of receipt of the letter. At the time the *Elliott* court rendered its decision, the Secretary had completed re-

coupment against two of these plaintiffs, but as to the other had deferred recoupment pending disposition of the suit.

Plaintiffs Elliott, Gaines and Yamasaki (subclass two) received notices more than thirty days before recoupment was to begin, the notice disclosing information similar that contained in the notices sent to subclass one plaintiffs.[4] Plaintiff Elliott was notified that the overpayment determination was predicated upon "her receipt of both retirement and disability benefits when she was entitled to only disability benefits." *Elliott*, *supra* at 965. "Duplicate payments" was the reason given Gaines for his overpayment, and plaintiff Yamasaki was told that "a processing error" caused an overpayment to be sent to her. All subclass two plaintiffs contacted their district office within thirty days after receipt of the overpayment notice. Recoupment against Elliott and Gaines was deferred pending resolution of this case, whereas recoupment against Yamasaki has been completed. *Elliott*, *supra* at 965-66.

As to plaintiffs Buffington and Biner, their claims arose out of factual situations similar to those pertaining to three of the named plaintiffs in *Elliott*.[5]

Both Buffington and Biner are recipients of social security old-age benefits. Based on "annual earnings reports" submitted by plaintiffs, the Secretary determined that they had received overpayments of

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[4] For a discussion of the major difference see note 2 *supra*.

[5] See note 2 *supra*.

benefits, and consequently sought to recoup the overpayments from plaintiffs' future benefits.[6]

In 1973 Mrs. Buffington was entitled in her own right to old-age social security benefits of $80.50 per month. Based upon her husband's earnings record, she was also entitled to wife's benefits of $15.70 a month, resulting in total monthly benefits of $96.20 (she actually was receiving $89.90 per month due to monthly Medicare deductions of $6.30). In September 1973, plaintiff's husband filed an annual earnings report which showed that he had received earnings in 1972 which exceeded the statutory limit. Accordingly, the Secretary determined Mrs. Buffington to have been in receipt of a total overpayment of $78.60. Notice of the overpayment was sent to Mrs. Buffington on October 3, 1973, indicating that the overpayment would be withheld from her next benefit check. In early November she received a social security check in the amount of $11.30. Mrs. Buffington subsequently submitted a request for reconsideration to the local administrative office. On July 24, 1974 her request was denied and the original overpayment determination was sustained.

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[6] Pursuant to 42 U.S.C. § 403(b), deductions from social security benefits must be made when a beneficiary's earnings exceed the amount prescribed by statute. To determine whether deductions are appropriate in any given case, a beneficiary who earns more than the statutory maximum is required to file an "annual earnings report" which sets forth the amount of wages earned by the beneficiary during the preceding year. The social security application form, and certain pamphlets sent to beneficiaries, advise the claimants of the filing requirement.

Mrs. Biner was found entitled to old-age social security benefits in November 1970. In November 1972, however, she notified her claims representative that she intended to cease working in December 1972.[7] The Social Security Administration in 1972 sent Mrs. Biner three checks in a total amount of $2,216.20, representing benefits for all of 1972.[8] However, the Administration subsequently discovered, as a result of a cross check with Biner's former employer, that Biner had earned income in

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[7] There is considerable dispute as to whether plaintiff Biner also informed the district office that her earnings would not exceed the statutory maximum in 1972. The Secretary contends that plaintiff represented to her claims representative that she would not have earnings above $1,680 for the year 1972, and that based upon this representation the Secretary issued Mrs. Biner $2,216.20 in excess benefit checks. Plaintiff Biner, on the other hand, claims that her purpose in contacting the local office was to ensure that she would begin receiving her benefits promptly after her retirement in December 1972, and, as such, would only have had cause to inform the office of the date of her retirement, not the amount of income she earned during 1972. In any event, she exceeded the earnings maximum in 1972—the year for which she received the benefit checks at issue here.

[8] It is unclear whether Mrs. Biner knew or should have had reason to know that these checks represented benefit payments for the year 1972. The Secretary contends that enclosed with at least the first check was a letter which indicated that the check was intended as back payment for 1972. Excerpts of this letter which are quoted in the affidavit of the Deputy Director of the Bureau of Retirement and Survivors Insurance of the Social Security Administration do not bear this out. *Buffington* Tr. 311. On the other hand, Mrs. Biner asserts that no explanation whatsoever was furnished by the Administration articulating the purpose in its sending this check.

excess of the statutory amount for 1972. Thereupon, the Secretary requested Mrs. Biner to file an annual earnings report, which she submitted on August 28, 1973; and it was upon this basis that the overpayment was determined.

In the latter part of September 1973, Mrs. Biner was notified that she had been overpaid, and consequently, her benefits would be suspended until the entire amount had been recouped. She was also supplied with a facsimile of the form letter referred to earlier. She received no benefit checks for October 1973. In Mid-October 1973 Mrs. Biner received a letter from the Administration containing "waiver" forms which she was instructed to fill out and return to the district office if she wished to do so. Mrs. Biner completed the forms and mailed them to the local office. However, submission of this request for waiver consideration did not halt recoupment proceedings. Moreover, on November 19, 1973 Mrs. Biner was informed that she was at fault in retaining the checks and, consequently, no waiver would be permitted. She was also informed that the original suspension of her benefits had been adjusted so that $50.00 per month would be withheld from her regular benefit payments.

During the latter part of 1973 Mrs. Biner twice requested reconsideration of the Secretary's overpayment decision. Again, recoupment was not halted. On April 8, 1974, however, the Secretary adhered to his initial determination that recoupment was appropriate, and continued to deduct amounts from

Mrs. Biner's subsequent benefit checks. In late May or early June of that year, Mrs. Biner requested and was granted on October 21, 1974 an administrative hearing to review the propriety of the Secretary's recoupment decision. After oral hearings, the administrative law judge sustained the Secretary's decision. Appeal of the judge's ruling is presently pending.

The District Courts Properly Exercised Jurisdiction Under 28 U.S.C. § 1361

The Secretary contends that the district courts erred in assuming jurisdiction over these cases pursuant to the Federal Mandamus statute, 28 U.S.C. § 1361. Mandamus has traditionally been viewed as appropriate to compel officials to comply with the law only when the claim is clear and certain and the duty of the officer is ministerial and "so plainly prescribed as to be free from doubt." *United States* v. *Walker*, 409 F.2d 477, 481 (9th Cir. 1969).

Typically, mandamus has been limited to cases in which statutory or regulatory duties were sought to be enforced. Recently, however, in *Knuckles* v. *Weinberger*, 511 F.2d 1221 (9th Cir. 1975), this court held section 1361 to supply the necessary jurisdictional basis when a constitutional duty is made clear by subsequent judicial interpretation. In *Knuckles* we conclude that a district court had section 1361 jurisdiction to consider constitutional claims asserted against the Department of Health, Education and Welfare's summary suspension of social security payments. In so holding, we made it clear

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that it is not essential to a finding of jurisdiction that the constitutional duty sought to be enforced be clear beyond all doubt from the outset of the litigation. See also *Brown* v. *Weinberger*, 382 F. Supp. 1092 (D. Ma. 1974). All that is required is that plaintiffs avoid asserting unsubstantial claims. *Mead* v. *Parker*, 464 F.2d 1108 (9th Cir 1972); Byse & Fiocca, "Section 1361 of the Mandamus and Venue Act of 1962 and 'Non-Statutory' Judicial Review of Federal Administrative Action," 81 Harv. L. Rev. 308 (1967). If we were bound to first determine the existence of a duty on the part of the Secretary as a prerequisite to finding jurisdiction under § 1361—an approach urged upon us by the Secretary—we would, in essence, be disposing of these cases on their merits—an exercise wholly inappropriate in deciding the threshold question of jurisdiction.

In the instant cases, the allegations contained in the complaints present substantial constitutional claims, namely, that *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), compels the conclusion that the precedures instituted by the Secretary deprive plaintiffs of their property without due process of law. While section 404 of the Social Security Act vests the Secretary with discretion in establishing procedures to recover overpayments, he may not institute procedures which violate the fifth amendment. Precedents clearly demonstrate that the applicability of the *Goldberg* rationale to the instant circumstances is not so tenuous as to seriously call into question the substantiality of

plaintiff's claims here. The district courts therefore properly assumed jurisdiction under § 1361 to decide whether the Secretary had abused his discretion.* *Accord Frost* v. *Weinberger*, 515 F.2d 57 (2d Cir. 1975); *Mattern* v. *Weinberger*, Civil No. 74-1776 (3d Cir., June 3, 1975) (slip opinion); *Martinez* v. *Richardson*, 472 F.2d 1121 (10th Cir. 1973).

The Class Action

The district court in *Elliott* certified the Silva, Ortiz and Vaquilar plaintiffs as representatives of a subclass of old-age beneficiaries resident in Hawaii subject to actual or possible recoupment of overpayments as a result of their own annual income reports. The Elliott, Gaines and Yamasaki plaintiffs were certified as a subclass representing recipients of old-age and disability benefits resident in Hawaii who were subject to actual or possible recoupment for reasons other than the filing of annual income reports. The court ordered (1) the posting of a notice in every local social security office; (2) the publishing of an advertisement in a non-legal section of two newspapers of general circulation; and (3) the inclusion of a notice of the suit in every letter from the Administrating informing the recipients of its overpayment determination. The notice informed the members of the class of the pendency of the suit, of

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* Having found an adequate jurisdictional basis under the Mandamus Act, it is unnecessary to decide whether the Administrative Procedure Act or 28 U.S.C. § 1331(a) also furnish an independent source of jurisdiction.

their right to intervene, and of their right to question the adequacy of their representation. *Elliott* Tr. 199-201. The Government takes no issue with the *Elliott* court's class certification order or with the adequacy of the notice provided.

The *Buffington* court certified the two named plaintiffs as representatives of a nation-wide class of persons eligible for social security old-age and survivors' benefits under 42 U.S.C. § 402 "whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing." The court excepted from the class residents of Hawaii and the Eastern District of Pennsylvania and those individuals involved in other litigation challenging the Secretary's procedures in recouping benefits without prior notice and hearing. *Buffington* Tr. 422-24. No notice whatsoever was provided members of the certified class.

The Secretary contends that the failure to order that notice be provided to the class was a violation of due process and that the class order must be declared invalid, reducing the effect of the judgment solely to the two individuals named as plaintiffs. The Secretary further argues that the district court abused its discretion in certifying a nation-wide class. We disagree.

There is little doubt that the district court's certification order satisfied the terms of Fed. Rule of Civ. Pro., Rule 23(c)(1) and (3). Furthermore, contrary to the Secretary's suggestion, this action is plainly of the type described in Rule 23(b)(2), not

23 (b)(3). Although plaintiffs seek recovery of monies recouped from their monthly benefit checks, their primary purpose in bringing this action is to enjoin the Secretary from recouping such sums without providing social security beneficiaries a proceeding hearing. It is only logical that as a necessary part of their claim plaintiffs would seek to recover money which they believed to have been retrieved pursuant to the procedures sought to be enjoined. In short, pecuniary recovery is purely incidental to this suit's principal purpose, and consequently this action is properly certifiable under 23 (b)(2). *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971). In similar cases, too numerous to cite here, class certification of an essentially (b)(2) action was not precluded simply because monetary benefits were an inevitable by-product of the recovery of the injunctive and declaratory relief prayed for. See cases cited in 3B Moore's Federal Practice, ¶ 23.40, at 23-652 to 23-654 (1974), and 1974 Cum. Supp. at 82 n.19. In any event, the *Buffington* court's judgment did not award plaintiffs damages.

Under Rule 23(c)(2) notice is mandatory in a (b)(3) class action. And the Supreme Court has so held. *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974). The Secretary contends that the *Eisen* rationale should be extended to cover all class actions, including, naturally, (b)(2) actions. However, even the *Eisen* Court acknowledged that the notice requirements of subdivision (c)(2) are inapplicable to (b)(2) class actions. *Id.* at 177 n.14. Rather,

Rule 23(d)(2) operates to make notice discretionary with the court in (b)(2) actions.

The weight of authority supports an interpretation—consistent with due process requirements—of Rule 23 which does not require notice in every (b)(2) class action. Compare *Katz* v. *Carte Blanche Corp.*, 496 F.2d 747, 756 (3d Cir.), *cert. denied*, 419 U.S. 885 (1974); *Woodward* v. *Rogers*, 344 F. Supp. 974, 980 n.10 (D.D.C. 1972), *aff'd*, 486 F.2d 1317 (D.C. Cir. 1973); *Yaffe* v. *Powers*, 454 F.2d 1362, 1366 (1st Cir. 1971); *Souza* v. *Scalone*, 64 F.R.D. 654, 659 (N.D. Cal. 1974); *Johnson* v. *City of Baton Rouge, La.*, 50 F.R.D. 295, 299 (E.D. La. 1970); *Northern Natural Gas Co.* v. *Grounds*, 292 F. Supp. 619 (D. Kan. 1968); 3B Moore's Fed. Prac. ¶ 23.55, at 23-1152; 7A Wright & Miller, Fed. Prac. & Proc., Civil § 1786 (1973) [notice not required in (b)(2) action] with *Schrader* v. *Selective Service Sys. Loc. Bd. No. 76*, 470 F.2d 73, 75 (7th Cir. 1972), *cert. denied*, 409 U.S. 1085 (1972); *Zielstra* v. *Tarr*, 466 F.2d 111 (6th Cir. 1970) [notice required].

The seminal case upon which most, if not all, courts requiring notice rely is the Second Circuit's decision in *Eisen* v. *Carlisle & Jacquelin*, 391 F.2d 555, 564-65 (2d Cir. 1968), in which the court by way of dicta stated that "notice is required as a matter of due process in all representative actions." *Id.* at 564. However, in *Frost* v. *Weinberger*, 515 F.2d 57, 65 (2d Cir. 1975), the Second Circuit rejected its earlier pronouncement in *Eisen* and specifically rule that *Eisen's* statements with respect to

notice only applied to class actions brought under provisions of Rule 23 other than (b)(2). Indeed, even before *Frost* some district courts in the Second Circuit resisted *Eisen's* inflexible due process approach to (b)(2) actions, and instead read *Eisen* to say that notice was required in class actions when due process so required. *Lynch* v. *Household Fin. Corp.*, 360 F. Supp. 720, 722 n.3 (D. Conn. 1973).[10]

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[10] Likewise, district courts in the Sixth Circuit have not uniformly chosen to follow the decision in *Zielstra* v. *Tarr, supra*; one court finding *Zielstra's* statement that due process required notice in all class actions purely dictum, "since the Court of Appeals held that the District Court did not have subject matter jurisdiction of the case which was on appeal." *Watson* v. *Branch County Bank*, 380 F. Supp. 945, 960 n.11 (W.D. Mich. 1974). *Cf. Alexander* v. *AVCO Corp.*, 380 F. Supp. 1282, 1286 (M.D. Tenn. 1974).

It is unclear where the Fifth Circuit stands on the notice question. In *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969), without discussing due process requirements, the court implied that notice in (b)(2) actions is not required. In Justice Godbold's specially concurring opinion he states that 23(b)(2) "does not require notice." *Id.* at 1127 n.1. Acting in apparent harmony with *Johnson*, the Fifth Circuit affirmed a Florida district court decision which held notice to be inappropriate in (b)(2) class actions. *Mungin* v. *Florida East Coast Ry. Co.*, 318 F. Supp. 720, 732 (M.D. Fla. 1970), *aff'd*, 441 F.2d 728 (5th Cir. 1971), *cert. denied*, 404 U.S. 987 (1971). On the other hand, the Fifth Circuit upheld a district court decision in which *Eisen* was followed and notice was found necessary in a (b)(2) action. *Pasquier* v. *Tarr*, 318 F. Supp. 1350, 1353-54 (E.D. La. 1970), *aff'd*, 444 F.2d 116 (5th Cir. 1971). Perhaps it is fair to infer that at least the Fifth Circuit does not ascribe to the procrustean view that notice is required in all representative actions, rather whether *vel non* notice is mandated depends on the circumstances involved and the applicability of relevant due process considerations.

Contrary to the Secretary's suggestion that the distinction between (b)(2) actions having monetary repercussions and (b)(3) actions is one solely of form of relief sought and not one of substance, relevant authorities have oft stated that the need for notice in a (b)(2) class action is *de minimis* simply because of its fundamental differences from a (b)(3) suit. As the Advisory Committee in its Note accompanying the proposed revised, now adopted, Rule 23 implies, the strict (c)(2) notice requirement is inapposite to a (b)(2) class because (b)(2) classes will tend to be more cohesive and unified so that adequate representation reduces the need for notice. See 39 F.R.D. 106.

> In representative actions brought under the other provisions of Rule 23(b) [provisions other than 23(b)(3)], the class generally will be more cohesive—for example, in many instances each member will be affected as a practical matter by a judgment obtained by another member if individual actions were instituted. Similarly, it is less likely that there will be special defenses or issues relating to individual members of a Rule 23(b)(1) or Rule 23(b)(2) class, than in the case of a Rule 23(b)(3) class. This means that there is less reason to be concerned about each member of the class having an opportunity to be present. 7A Wright & Miller, *supra*, § 1786, at 143.

To the extent that absent class members might, as a matter of policy disfavor the position taken by named plaintiffs, defendants are usually more than adequate

action to, for example, submit views as amici curiae, are in need of being served, does due process require the direction of some sort of notice to absent members of a (b)(2) class. In the instant case no such special circumstances exist to impel us to overturn the *Buffington* court's decision not to provide notice.

There is no question but that plaintiffs here are represented by skilled and experienced counsel. Their record here and at the district court level is testimony to this commendation. When, as here, absent members' interests are adequately assured of being represented because there are no money damages involved, no significant factual dispute is in need of resolution, the only issues raised are constitutional, and there is no serious question as to the competency of counsel, notice to the class serves no apparent purposes. *Lynch* v. *Household Fin. Corp.*, *supra*; *Woodward* v. *Rogers*, *supra*. The presentation of additional individual claims would have complicated the suit and protracted it to the detriment of the class as a whole. The named plaintiffs' claims are typical of the class, and additional plaintiffs are unnecessary. The constitutional issues involved in the suit have been exhaustively briefed by counsel and fully canvassed in the cases and commentaries, thus rendering additional supplementation by absent members as amici curiae superfluous. *Watson* v. *Branch County Bank*, *supra*. For all intents and purposes, the class members of

stand-in for the purpose of presenting the policy arguments to the court.

> Thus, in suits under subdivisions (b)(1) or (b)(2), once the court determines that the members are adequately represented as required by Rule 23(a)(4), it is reasonably certain that the named representatives will protect the absent members and give them the functional equivalent of a day in court.
>
> In keeping with this philosophy, class members in Rule 23(b)(1) and Rule 23(b)(2) actions are not provided an opportunity by the rule to exclude themselves from the action as is true in Rule 23(b)(3) actions. [*Air Line Stew.* v. *American Airlines, Inc.*, 490 F.2d 636, 642 (7th Cir. 1973); *Johnson City* v. *City of Baton Rouge, supra; Van Gemert* v. *Boeing Co.*, 259 F. Supp. 125, 130 (S.D.N.Y. 1966)]. Because they do not have the alternative of bringing a separate suit, notice really serves only to allow those members the opportunity to decide if they want to intervene or to monitor the representation of their rights. [*Souza* v. *Scalone, supra*, 64 F.R.D. at 659; *Watson* v. *Branch County Bank, supra*, 380 F. Supp. at 959].

We are of the opinion that the better reasoned view counsels against requiring, under due process principles, notice in every (b)(2) action. Only when the purposes in providing class members an opportunity to signify whether representation by named plaintiffs is fair and adequate or to intervene to present additional claims or to otherwise come into the

the instant class have received their functional equivalent to a day in court."[11]

The Secretary's claim that the *Buffington* court abused its discretion in certifying a nation-wide class is similarly unpersuasive. In reviewing the designation of a class by the trial judge the appellate court should allow the broadest discretion. *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295 (2d Cir. 1969). Furthermore, nothing in Rule 23 indicates that a class should not be designated because it is too large. Certification of a national class action is not unknown in the federal courts. *See Woodward* v. *Rogers, supra.* The Secretary does not cite, nor can we find, any authority which supports his rather novel theory limiting (b)(2) class actions because of their numerosity and manageability problems. By its terms, Rule 23 makes manageability an issue important only in determining the propriety of certifying an action as a (b)(3), not a

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[11] That Buffington's class determination forecloses absent members from bringing individual suits thereafter, in and of itself, is not a factor militating against certification of a (b)(2) class action. If it were otherwise, no class actions could ever be certified under (b)(2). This is so because in (b)(2) actions absent members, regardless whether they receive notice or not, cannot excuse themselves from the litigation or avoid the res judicata effects of the judgment entered therein. *Compare Air Line Stew.* v. *American Airlines, Inc., supra*, 490 F.2d at 642, with *Schrader* v. *Selective Service Sys. Loc. Bd. No. 76, supra*, 470 F.2d at 75. Indeed, (b)(2) actions are generally preferred for their wider res judicata effects. *Bing* v. *Roadway Express, Inc.*, 485 F.2d 441, 447 (5th Cir. 1973).

(b)(2), class action. And as a practical matter, since plaintiffs seek no damages, and because notice is not required to be directed to these class members, there simply are no manageability problems here involved.

In short, the *Buffington* suit strikes us as the classic type of action envisioned by the drafters of Rule 23 to be brought under subdivision (b)(2). The Secretary has acted on grounds generally applicable to all members of the class and final injunctive and declaratory relief with respect to the whole class is appropriate. Even if we required the *Buffington* suit to proceed on behalf of the named plaintiffs only, the injunctive relief awarded in this suit would necessarily operate in favor of all social security old-age and survivor benefit recipients. It would be a practical absurdity were the Secretary to provide the due process safeguards enunciated herein to the exclusion of all save the named plaintiffs. The Administration would be besieged with suits seeking the vindication of each and every social security recipient of old-age and survivors' benefits subject to the Secretary's recoupment procedures. With a copy of this decision in their hands, ever-watchful legal-assistance attorneys would wreak havoc on the administration of the Secretary's recoupment programs. Multiplicity of actions based on the same constitutional claims advanced here would be the inevitable result. Obviating such unnecessary duplication is the very purpose for which Rule 23(b)(2) was designed. Maintenance of the instant case as a class action is not only proper,

but it also will effectuate the interests both of judicial administration and of justice.

The Merits

The principal case upon which plaintiffs rely is *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). There the Supreme Court held that a pre-termination evidentiary hearing was required before a welfare recipient's benefits could be terminated. Stressing the recipient's "brutal need" in continued payments, the Court found that in the balance

> the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. *Goldberg*, *id.* at 266.

Plaintiffs contend that the *Goldberg* decision compels a finding that pre-recoupment hearings are constitutionally necessary when the Secretary determines that overpayments have been made to social security old-age and disability beneficiaries and seeks to recoup those overpayments.

On the other hand, the Secretary argues that, for the following reasons, *Goldberg* should be read narrowly, and thus determined inapposite to the cases here: (1) the Secretary's present "written hearing" is adequate to establish the "probable validity" of the Administration's overpayment determination; (2) the impact upon a social security recipient of a

reduction in or suspension of his or her monthly payments is not severe enough to warrant providing the recipient an oral hearing prior to recoupment; (3) to require such a hearing would result in vast disruption of the Social Security System; (4) in waiver consideration cases no property interest is involved invoking due process safeguards; and (5) no factual issues are presented in reconsideration cases necessitating oral pre-recoupment hearings.[12]

In *Mattern* v. *Weinberger*, Civil No. 74-1776 (3d Cir. June 3, 1975) (slip opinion), all the arguments

[12] In a footnote, the Secretary postulates that since the plaintiffs in *Elliott* whose overpayments were determined by information other than that disclosed in annual earnings reports have as yet had their reconsideration and/or waiver claims acted upon by the Secretary (due to the district court's order prohibiting the Secretary from so acting), "the court's failure to await the Secretary's action on those written requests was plain error." Appellants' Brief in *Elliott*, at 17 n.19. In other words, the Secretary contends that the district court failed to observe the requirement that administrative remedies must be exhausted as a requisite to the initiation of proceedings in a federal court.

However, the case here is to be distinguished from the normal situation in which federal jurisdiction is sought to be invoked to review administrative action. Most often, the courts are asked to scrutinize the merit of an administrative determination, and in that instance, the available avenues of administrative review must ordinarily be exhausted. On the other hand, where, as here, the procedures which the agency contends must be exhausted are themselves the subject of attack, exhaustion is unnecessary. *Finnerty* v. *Cowen*, 508 F.2d 979 (2d Cir. 1974); *Martinez* v. *Richardson*, *supra*, 472 F.2d 1121; *Marsh* v. *County School Bd.*, 305 F.2d 94 (4th Cir. 1962); *Francois* v. *Bushell*, 325 F. Supp. 531 (N.D. Cal. 1971).

advanced here by the Secretary to distinguish the cases at bar from *Goldberg*, as well as the arguments propounded here by the Secretary, in connection with the burden that requiring pre-recoupment oral hearings would impose on the Administration, were fully considered and for the most part rejected. This Court concurs with the Third Circuit's opinion and shares in its conclusion that *Goldberg* requires the Secretary to provide social security beneficiaries with a pre-recoupment oral evidentiary hearing along the parameters and with the qualifications outlined in the *Mattern* decision.

It cannot be seriously maintained that some form of process is not due social security beneficiaries whose old-age or disability payments are subject to suspension or reduction under the Secretary's recoupment procedures. Plaintiffs' interests in their monthly benefits amounts to a statutory entitlement and, therefore, constitutes a property interest protected under the Due Process Clause of the fifth amendment. *Goss* v. *Lopez*, 419 U.S. 565, 573 (1975); *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972); 42 U.S.C. § 401 et seq. Thus, they may be deprived of their property interests only by due process of law. *Id.* That the deprivation of such property interests does not subject the persons entitled thereto to a "severe detriment or grievous loss" is of no moment in determining whether due process comes into play.

> [F]or in determining 'whether due process requirements apply in the first place, we must look not to the "weight" but to the *nature* of the in-

terest at stake.' [citations omitted.] [T]he length and consequent severity, while another factor to weigh in determining the appropriate form of hearing, 'is not decisive of the basic right' to a hearing of some kind. [citation omitted.] The Court's view has been that as long as a property deprivation is not *de minimis*, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. [citations omitted.] *Roth* at 576 (emphasis original.)

A suspension or reduction in old-age or disability benefits imposed in order to recover an alleged overpayment is not a *de minimis* deprivation outside the protection of the due process clause. *See Goss, id.* (wherein the Court found a 10-day suspension from school not to be *de minimis*).

The Secretary contends that where a recipient admits that an overpayment has been made but seek to gain a waiver of recoupment under 42 U.S.C. § 404(b), the recipient has no property interest in the amounts overpaid deserving of due process protection. This argument is untenable. In *Board of Regents* v. *Roth, supra* at 577, the Supreme Court observed that,

> the welfare recipients in *Goldberg* v. *Kelly, supra*, had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they

> had a right to a hearing at which they might attempt to do so.

Thus, the social security beneficiaries here who concede they have been overpaid nonetheless possess a property interest in their right to demonstrate they are eligible for waiver under the terms of 42 U.S.C. § 404(b). Section 404(b) provides a recipient of an overpayment with a statutory right not to have his payments reduced or suspended if he is "without fault" and the recovery would "defeat the purpose" of the Act or "would be against equity and good conscience." It is not a matter of "governmental beneficence," as the Secretary puts it, in his waiving recoupment. Rather, it is a question of complying with the statute. Indeed, under section 404(b) waiver is not discretionary, but mandatory, viz., it provides that "there *shall* be no" recoupment under the conditions specified. "Thus, the fact that [plaintiffs] may not have been entitled to *receive* the overpayment[s] does not mean that [they have] no claim of entitlement to *retain* [them] (or at least to receive the full amount of [their] future monthly payments)." *Mattern* v. *Weinberger, supra* at 26. (emphasis original.)

More difficult, however, is determining the form of process to which plaintiffs are due. The Secretary contends that, except in the "most extraordinary" circumstances as epitomized by *Goldberg* v. *Kelly*, the Supreme Court has not required trial-type hearings prior to a deprivation of a property interest where, as here, the preliminary pre-deprivation procedures

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are sufficient to establish the "probable validity" of the administrative claim.

In *Mattern*, the Third Circuit voiced what we believe to be the crucial flaws in the Secretary's analysis.

> First, the Secretary relies primarily on a line of cases which, while having some relevance on the issue, did not purport to overrule or modify *Goldberg* and are not controlling here. *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969). Of these three decisions, only *Mitchell* indicated that 'probable validity' may be determined in the absence of a prior oral hearing; *Fuentes* and *Sniadach*, in fact, required prior oral hearings. Thus, *Mitchell*, rather than *Goldberg*, represent the exception to the rule. . . . In *Goldberg*, the Supreme Court considered a state welfare procedure in which a claimant had a right, after being interviewed by his caseworker and prior to termination of benefits, to receive a written explanation of the reasons for termination and to submit written information in rebuttal. He also had a right to a full oral hearing *after* termination. 397 U.S. at 258-60. The Court, however, held that this procedure was insufficient and required an oral hearing prior to termination. Since the procedure invalidated in *Goldberg* would seem to be at least effective in ensuring 'probable validity' as the procedure used here, and since the Court in *Mitchell* did not purport to modify *Goldberg*, we refuse to extend the reasoning of *Mitchell* outside the creditor/debtor

> context and to permit *ex parte* determination of 'probable validity' in social welfare cases.
>
> Furthermore, even if *Mitchell's* 'probable validity' analysis were applicable to social welfare cases, the procedure here may not pass muster. . . . The Court upheld the Louisiana sequestration statute challenged in *Mitchell* partly because it provided for an immediate hearing after the writ issued. *Id.* at 618. Thus, the constitutionality of a procedure establishing 'probable validity' without a full oral hearing prior to the property deprivation may depend in part on whether there is an immediate right to an oral hearing afterward. *Mattern*, *supra* at 14-16. (emphasis original.)

As evidenced in the case of plaintiff Biner, however, attending review of the Administration's initial overpayment determination exists a delay of several months between the time recoupment commences and the time a recipient is provided a hearing.

> Finally, if the Secretary's pre-recoupment procedures are to be upheld on the ground that they are sufficient to determine 'probable validity,' they would have to be effective in minimizing the risk of an erroneous determination. *See Mitchell*, *supra* at 618; *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), at 170 (Powell, J., concurring) and 188 (White, J., concurring in part and dissenting in part.) However, the Secretary's own figures undercut his contention that the procedures at issue here are effective to minimize erroneous decisions to recoup. In 1970, the only year from which figures have been made avail-

able to us [as is also the case here], over one-third of all persons seeking a post-recoupment hearing (560 out of 1600) obtained reversals.

Therefore, because of a combination of factors —the fact that the Supreme Court has given no indication that *Mitchell's ex parte* 'probable validity' approach is applicable outside the creditor/debtor context, and that such an approach appears to have been at least implicitly rejected in *Goldberg* v. *Kelly*; the substantial delay between the initiation of recoupment and an oral hearing; and the significant reversal rate following post-recoupment hearings—we conclude that the pre-recoupment procedures cannot be defended on the ground that they are sufficient to establish the 'probable validity' of the determination in question. *Mattern*, *id.* at 16-17.

The Secretary also contends that oral hearings are not compelled here because unlike the welfare recipients in *Goldberg* whose benefits were terminated, social scurity beneficiaries whose monthly payments are suspended or reduced through recoupment procedures are not thereby necessarily left destitute. In the Secretary's view, the severity of the impact visited upon plaintiffs here is not of the same quantum as that involved in *Goldberg*, and therefore, the oral hearing required in *Goldberg* is here unnecessary. However, the line of precedent following the *Goldberg* decision does not support the Secretary's position.

It is axiomatic that the requisites of due process vary according to specific factual contexts. *Goldberg*,

supra at 262-63. And it is true that of significant importance in determining the formality and procedural requisites of the process due in particular circumstances is the relative weight of the property interest involved. *Board of Regents* v. *Roth*, *supra* at 570; *Crow* v. *California Dept. of Human Resources Develop.*, 490 F.2d 580 (9th Cir. 1973), *vacated* 95 S.Ct. 1110. That is not to say, however, that the relative weight of the interest involved is dispositive of the question whether an oral hearing is to be afforded in the first place. In its most recent pronouncements concerning the subject, it has become quite clear that the Supreme Court envisions due process to generally require a pre-deprivation hearing of some type as long as the interest at stake is not *de minimis*, irrespective of the severity of the impact resulting from that deprivation. *Goss* v. *Lopez*, *supra*; *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601, 606 (1975); *Fuentes* v. *Shevin*, *supra* at 88-89; *Bell* v. *Burson*, 402 U.S. 535 (1971).[13]

The government does not contend, nor can it be said, that the interest of these plaintiffs in receiving their monthly social security benefits is *de minimis*. As a threshold determination, therefore, it is our opinion that, excluding for the moment consideration of any competing interests on the part of the government, a hearing of some sort should be afforded plaintiffs prior to the recoupment of their social secur-

[13] We share the Third Circuit's view that Judge Friendly's contrary holding in *Frost* v. *Weinberger*, 515 F.2d 57 (2d Cir. 1975), is distinguishable and should not be followed.

ity old-age and disability benefits. Of similar resolve were the courts in *Mattern* v. *Weinberger*, *supra*; *Eldridge* v. *Weinberger*, 493 F.2d 1230 (4th Cir. 1974), *aff'g* 361 F. Supp. 520 (W.D. Va. 1973), *cert. granted*, 43 U.S.L.W. 3383 (January 14, 1975); *Williams* v. *Weinberger*, 494 F.2d 1191 (5th Cir. 1974), *aff'g* 360 F. Supp. 1349 (N.D. Ga. 1973).

As previously noted, due process is a flexible concept, and fashioning the specific parameters of the hearing required thereunder depends on striking an appropriate accommodation of the competing interests involved. *Goss*, *supra* at 579. The Secretary suggests that affirmance of the district courts' holdings that due process requires a full *Goldberg* type hearing prior to recoupment of overpayments made to social security beneficiaries would impose a heavy fiscal burden on the Department of HEW. Since the Department already provides overpaid recipients elaborate post-recoupment procedures, including the opportunity for a *de novo* hearing, it appears that any burden in having to establish a new system, wherein the opportunity for a hearing must be provided before rather than after recoupment, will be minimal. The major fiscal difficulty envisioned by the Secretary is the likelihood that the availability of pre-recoupment hearings will result in the filing of a far greater number of requests for reconsideration or waiver.

During oral argument counsel for the Secretary cited statistics that show that the number of hearings on termination of welfare benefits has increased from 19,000 per year to 68,000 per year since the

decision of the Supreme Court in *Goldberg*. Without further clarification, these statistics are of little value. They do not disclose what change, if any, has taken place in the success rate of welfare beneficiaries who receive a hearing. If the effect of *Goldberg* were to cause the filing of a large number of frivolous requests for hearings by people seeking to delay termination, there might be reason to question the wisdom of *Goldberg*. But if, in fact, the percentage of successful contests has remained constant or declined slightly, then *Goldberg* has resulted in a larger number of correct determinations of the issue of whether welfare benefits should be terminated, and, as such, *Goldberg* has benefited rather than burdened the system.

If requiring pre-recoupment hearings would result in the filing of frivolous requests in order to delay recoupment, the present procedure should also encourage frivolous written requests for reconsideration or waiver. This is so because the present practice of the Secretary is to delay recoupment until after a determination by the Department that the request should not be granted. But the statistics provided by the Secretary show a high rate of success among those requesting either reconsideration or waiver. "Of those who do contest the initial overpayment determination, about sixty-nine per cent succeed in getting the Administration to reverse itself." *Elliott* v. *Weinberger*, 371 F. Supp. at 967. One may reasonably wonder what happened to the frivolous, delay-motivated requests for reconsideration or waiver?

As evidenced by plaintiff Biner's case, the present procedure involves a substantial delay anywhere from four to five months between the time a recipient requests an administrative *de novo* hearing upon his or her claim for waiver or reconsideration and the time the hearing is held and the matter is disposed of. Thus, a decision that hearings must be held prior to recoupment would mean that the government could not collect payments for several months after the initial determination that recoupment was necessary. However, the present system has the evil of denying benefits for an equally long time from beneficiaries who are successful, after a full hearing, in reversing the Secretary's initial determination. Which system is preferable should depend upon the success rate of recipients who take their case to the hearing stage. Relevant statistics indicate this rate to be very high —more than one third of those recipients who avail themselves of the opportunity to have their grievances resolved at the *de novo* hearing succeed in persuading the Administration to reverse its original recoupment decision. *Elliott*, *supra* at 967. Since the success rate is significantly high, the government is being allowed to temporarily recoup payments when it has no claim to them. *See Fusari* v. *Steinberg*, 95 S.Ct. 533 (1975), in which the Supreme Court found "significant" in determining the requisites of due process a 19.4 to 26.1 per cent reversal rate of appealed denials of unemployment compensation benefits. A system which delayed the start of recoupment

pending the outcome of a hearing, the purpose of which is to determine the propriety of that recoupment, would provide a net benefit to society.[14]

As alluded to earlier, the Secretary draws a distinction between reconsideration cases and waiver consideration cases, contending that they raise somewhat different legal issues. Under the present procedures, when a recipient asks that the Secretary's overpayment determination be reconsidered, he is challenging the correctness of the overpayment determination itself. Contrariwise, when a social security beneficiary asks that recoupment be waived, he, in essence, is conceding that he was overpaid, but asks that recovery of the excess benefits involved be foregone.

The Secretary contends that in the vast majority of recoupment cases issues are presented which are

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[14] In *Fusari* v. *Steinberg*, *supra*, the Court discussed the manner in which the delay in payment of unemployment insurance benefits pending a hearing affected the balancing required to determine the requirements of due process.

> In this context, the possible length of wrongful deprivation of unemployment benefits [between 100 and 126 days] is an important factor in assessing the impact of official action on the private interests. [citations omitted.] Prompt and adequate administrative review provides an opportunity for consideration and correction of errors made in initial eligibility determinations. Thus, the rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process. 95 S.Ct. at 540.

Fusari appears to require that the existence of a substantial delay between the initial administrative determination and the conclusion of a full hearing be weighed as a factor tilting the scales toward providing a pre-recoupment hearing.

uniquely suited to resolution by written submissions and documentary proof, thus obviating the need to provide full-blown, *Goldberg* type hearings. Although we agree that in those cases where factual disputes are as well suited to disposition by documentary proof and written submissions as by oral hearings, due process does not require a pre-recoupment oral hearing, we cannot divine, as does the Secretary, that in virtually all reconsideration and waiver cases the only issues raised are those adaptable to such facile resolution. The Third Circuit's analysis of those cases arising in the recoupment context in which such documentary disposition is permissible under due process principles is extremely well reasoned and warrants quotation here.

> Implicit in *Goldberg* v. *Kelly* is the recognition of the fact that issues likely to arise in welfare termination cases can only be resolved through an oral hearing. One of the plaintiffs was a woman whose benefits had been terminated because she allegedly failed to cooperate with welfare officials in suing her estranged husband. Another was a man whose benefits were terminated because he refused to accept drug counseling and rehabilitation, though he claimed that he did not in fact use drugs. *Goldberg*, *supra* at 256 n.2. It is obvious that resolution of those factual disputes could only be made at an oral hearing, where the trier of fact could evaluate the credibility of the claimant. As the Court noted, "where credibility and veracity are at issue, as they must in many

termination proceedings, written submissions are a wholly unsatisfactory basis for decision." *Id.* at 269.

Similarly, in *Goss* v. *Lopez*, *supra*, the question of whether a student had engaged in disruptive conduct justifying suspension could not possibly be determined without an oral hearing. See also *Bell* v. *Burson*, *supra*, which required an oral hearing to determine fault before revocation of a driver's license. By contrast, the Supreme Court in *Mitchell* held that no prior opportunity whatsoever need be given the debtor to oppose repossession of his property, in part because "the issue turns on the existence of the debt, the lien, and the delinquency," which "are ordinarily uncomplicated matters that lend themselves to documentary proof." *Id.* at 609. Thus, "[t]he nature of the issues at stake minimize the risk" of an erroneous *ex parte* determination. *Id.* at 609-10 *Mattern*, *supra* at 23-24.

* * * *

We agree with the Secretary that "reconsideration" cases are generally well suited to resolution by documentary proof, and that claimants in most cases of this type are not constitutionally entitled to a prior oral hearing.[28]

> 28. We decline to establish a flat rule that *all* "reconsideration" cases may be decided prior to recoupment without oral hearing, since we do not have sufficient basis for knowing all the types of cases which the Secretary may classify as being of the "reconsideration" type. The crucial distinction is not whether the cases are labeled

"reconsideration" or "waiver," but whether they lend themselves to resolution by documentary proof. Thus, while we shall use those terms as suggested by the Secretary for purposes of convenience, we do not mean to imply that the constitutionality of recoupment in a particular case is dependent upon the label used nor that we necessarily accept the Secretary's categorization *in toto*.

[As exemplified by the cases at bar] most of these disputes involve matters of a purely arithmetical nature—whether the computation of an earnings statement is correct; whether a computer's calculation of the amount of benefits received is accurate; whether two benefit checks have been received rather than one. In such circumstances, an examination of social security records and cancelled checks would seem to be sufficient, and it is hard to see how an oral hearing would be of much benefit to the claimant. Consequently, the Secretary's pre-recoupment procedures permitting written evidence and providing for an examination of written documents, when coupled with a right to a *post*-recoupment oral hearing, satisfy due process.

We had one *caveat*, however. Because we cannot envision all the situations in which "reconsideration" cases are likely to arise, we acknowledge the possibility that there may be cases where the opportunity to appear in person might be important in making an accurate determination. Thus, while many "reconsideration" cases can be decided without a prior oral hearing, we believe that, as a matter of due process, the

Secretary should establish procedures which would provide for an oral hearing where a case does not hinge on documentary evidence and where a claimant raises issues which necessitate an evaluation of his credibility. We are mindful of the concern expressed in *Goldberg* that many claimants lack the education or ability to frame written submissions in a persuasive light, and thus if a claimant in a "reconsideration" case *raises* such an issue, he should be entitled to a hearing.

If, however, a claimant merely denies receiving duplicate checks or claims that his earnings were of a certain amount, cancelled checks bearing his endorsement or earnings records maintained by the social security office would seem to constitute hard proof incapable of oral rebuttal. *Mattern, supra* at 24-25.

If plaintiff Biner had simply denied receiving the checks here in dispute or had claimed that they did not represent an overpayment, she would not have been constitutionally entitled to a hearing prior to recoupment. Cancelled checks bearing her endorsement would have been persuasive proof that she had received and negotiated them, and a comparison of the salary listed in her earnings report with the statutory maximum—showing the former to exceed the latter—would be strong evidence that the checks represented an overpayment. "Furthermore, [plaintiff Biner] came forth with no written evidence to support a contention that she had not in fact been paid [$2,216.20] or that the check[s] did not repre-

sent an overpayment." *Id.* at 25-26. In her two requests for reconsideration, she simply stated that "I do not believe there was any overpayment." *Buffington* Tr. 112, 113.

> Consequently, if she had made solely those contentions, it is hard to see how a pre-recoupment oral hearing would be helpful. In all cases, however, a claimant should be informed, prior to initiation of recoupment, of the basis on which an adverse determination is made and should be offered the opportunity to explain or rebut any written evidence against her.[15]
>
> * * * *
>
> The Secretary also contends that "waiver" cases, like "reconsideration" cases, lend themselves to resolution by documentary proof. We disagree. One of the factors to be considered in a "waiver" case is whether the claimant is "without fault," and the Supreme Court has clearly indicated that determinations as to fault must be made at an oral hearing. *Mattern, supra* at 26-27.

As in *Mattern*, the "facts of [plaintiff Biner's case] graphically illustrate the need for an oral hearing." *Id.* While conceding that it may have been at fault in issuing Mrs. Biner the checks which represented

[15] Like the district court in *Elliott* we have serious doubts as to the adequacy of the Secretary's summary explanation of some of its overpayment determinations as the result of "processing error." *Elliott* Tr. 285. The strictures of due process would seem to compel a more elaborate description of the type of error which gave rise to the Secretary's determination in the first instance.

overpayments for the year of 1972, the Administration nonetheless believed that the letter enclosed with the first check sent to Biner and the fact that she received checks while she was employed put her on notice that continued retention of those checks was improper and precluded a finding on its part that she was "without fault" within the meaning of the Social Security Act. *Buffington* Tr. 212-13. However, whether Biner knew that she was not entitled to these checks seems to be a matter difficult to resolve without hearing her side of the story. "Similarly, a finding of fault could not rest on the ambiguous [letter included with the first overpayment check sent to Biner] at least without giving [her] an opportunity to explain in person what she thought it meant." *Id.* at 27.

> Another requirement that a claimant in waiver case must meet is that recoupment would either frustrate the purposes of the Act or be against equity and good conscience. As defined by the Secretary's regulations, these terms refer to such matters as difficulty in meeting necessary living expenses or a change of position by the recipient. [20 C.F.R. §§ 404.508, 404.509] We do not see how a resolution of such questions can reliably be determined in the absence of oral testimony.
>
> While we believe that claimants in "waiver" cases have a constitutional right to a pre-recoupment oral hearing, that right may not attach in all cases. Where a claimant in a "waiver" case raises no disputed issue of fact,

or where, accepting his version of the facts as true, we could say as a matter of law that he was not entitled to retain the overpayment, then again it is hard to see how a pre-recoupment hearing would be of benefit. Thus, the constitutional requirement of a hearing may be limited to some extent by principles analogous to summary judgment in civil litigation. *See Mills* v. *Richardson*, 464 F.2d 995 1001 (2d Cir. 1972). *Id.* at 27-28.

* * * *

In sum, we conclude that the recoupment procedure established by the Secretary is constitutionally deficient in that it does not provide for pre-recoupment oral hearings in the situations we have indicated are necessary. We do not believe that due process requires pre-recoupment oral hearings in all cases, but the Secretary's existing procedure makes no distinction between the various types of cases and issues that are likely to arise. To the extent that a hearing is required, we agree with the district court[s] that the full panoply of procedural safeguards need not be provided and that the pre-recoupment hearing need not take the form of a judicial or quasi-judicial trial. *Id.* at 28-29.

We are therefore of the opinion that to the extent indicated below the specific requirements outlined in the lower court's opinions are those which are compelled by the Due Process Clause of the fifth amendment. Specifically, the Secretary is required to provide a pre-recoupment hearing in the situations noted previously which affords the complainant the following rights:

1. to present his case orally and to submit evidence with witnesses or documents;

2. to cross-examine witnesses against him;

3. to be represented by counsel if he wishes or to retain the informal assistance of a friend;

4. to have an independent hearing officer preside during the hearing who is totally uninvolved with the initial overpayment and recoupment decisions;

5. to receive an opinion written by the hearing officer which sets forth his decision and the reasons and evidence in support of it;

6. to review his file five days before the hearing;

7. to receive adequate notice at least thirty days prior to the commencement of recoupment: (1) explaining the reasons recoupment is sought; (2) apprising him that in the event he, in writing, requests reconsideration or waiver of the Secretary's initial overpayment and recoupment determination, the Administration will subsequently inform him of the form of review to which he is entitled pursuant to the opinion herein rendered; and (3) informing him that recoupment will not begin until his request has been finally disposed of by way of the required review procedure.[16]

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[16] The court in *Elliott* found the Secretary's form of notice deficient insofar as it failed to apprise recipients of the appropriate forms which must be completed in order to invoke the Administration's review procedures. To remedy the situation, the court ordered the Secretary to specify in his initial overpayment notice those forms the recipient must re-

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The judgments of the district courts are affirmed in part and reversed in part, and the cases are remanded for the entry of new judgments consistent with this opinion.

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quest from the local office to perfect his appeal rights. Although any written submission will trigger commencement of the Administration's reconsideration and/or waiver procedures, given the writing capabilities of many of these old-age and disabled beneficiaries and the subleties which may inhere in determining whether an oral hearing is required in any given situation, it would be prudent of the Secretary to furnish recipients information as to the forms involved in cases of this sort and encourage their utilization. We do not hold that providing information as to such forms is a matter of constitutional imperative, however.

It is to be noted that any recipient who fails to notify the local office of his desire to have his overpayment and recoupment determination reviewed within the thirty day period will be deemed to have waived his right to seek that review by way of written submissions or by way of an oral hearing.

APPENDIX E

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-3118

DC# 734-73C2

FANNIE BUFFINGTON and FRANCES BINER, Individually and on behalf of all others similarly situated, PLAINTIFFS-APPELLEES,

v.

CASPAR WEINBERGER, Individually and in his capacity as Secretary of the Department of Health, Education and Welfare, DEFENDANTS-APPELLANTS.

APPEAL from the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause

be, and hereby is AFFIRMED IN PART AND REVERSED IN PART, AND REMANDED.

A TRUE COPY
ATTEST:

[February 19, 1976]

EMIL E. MELFI, JR.
Clerk

by /s/ [Illegible]
Deputy

[SEAL]

Filed and entered October 1, 1975

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1611

DC# 72-3629

EVELYN ELLIOTT and BENITO MOLINA, Individually and on behalf of all others similarly situated,
PLAINTIFFS-APPELLEES,

v.

CASPAR W. WEINBERGER, Individually and in his capacity as Secretary, United States Department of Health, Education and Welfare; etc., et al.,
DEFENDANTS-APPELLANTS.

APPEAL from the United States District Court for the District of Hawaii (Honolulu).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED IN PART AND RE-

VERSED IN PART, AND REMANDED TO THE DISTRICT COURT.

A TRUE COPY
ATTEST:

[February 19, 1976]

EMIL E. MELFI, JR.
Clerk

by /s/ [Illegible]
Deputy

[SEAL]

Filed and entered October 1, 1975

APPENDIX F

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 72-3629

EVELYN ELLIOTT and BENITO MOLINA, Individually and on behalf of all others similarly situated,
PLAINTIFFS

vs.

CASPAR WEINBERGER, Individually and in his capacity as Secretary, United States Department of Health, Education and Welfare; and SUNG DAI SEU, Individually and in his capacity as Pacific Area Manager, Social Security Administration, Department of Health, Education and Welfare,
DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Under 42 U.S.C. § 404(a) and (b),[1] the Secretary of the Social Security Administration (hereinafter

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[1] § 404. Overpayments and underpayments

(a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:

[Footnote continued on page 51a]

the "Administration") may effect or waive recoupment of overpayments made to social security recipients. The Administration has promulgated procedures and regulations governing recoupment and

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[1] [Continued]

(1) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. A payment made under this subchapter on the basis of an erroneous report of death by the Department of Defense of an individual in the line of duty while he is a member of the uniformed services (as defined in section 410(m) of this title) on active duty (as defined in section 410(1) of this title) shall not be considered an incorrect payment for any month prior to the month such Department notifies the Secretary that such individual is alive.

(2) With respect to payment to a person of less than the correct amount, the Secretary shall make payment of the balance of the amount due such underpaid person, or, if such person dies before payments are completed or before negotiating one or more checks representing correct payments, disposition of the amount due shall be made in accordance with subsection (d) of this section.

(b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

waiver in its *Claims Manual* § 5503[2] and in the

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[2] The CLAIMS MANUAL § 5503(a) provides that standard form letters sent to recipients subject to recoupment contain:

(1) The incorrect payment made and how and when it occurred.
(2) The right to request reconsideration of the overpayment determination.
(3) The required recovery.
(4) The proposed adjustment or the demand for repayment where adjustment is not possible.
(5) The waiver provisions of the law (Social Security Act, secs. 204(b) or 1870(c)).
(6) The availability of partial adjustment or partial refund.
(7) The need to notify the DO [Department Office] promptly if the person feels that the circumstances in the case would justify reconsideration, waiver, partial adjustment, or partial refund.

§ 5503(b) provides:

Delay in Withholding Benefits to Recover Overpayments.

Before we start to adjust the overpayment against the benefits due a beneficiary, he or his payee will normally be given reasonable opportunity to contest the correctness of the determination or to establish that a basis exists for waiver or partial adjustment. The notice to the beneficiary will advise him that adjustment will be deferred for a longer period when the facts in a given case, including but not limited to time case is being being worked, cutoff dates, mailing time, etc., indicate that a 30-day period would be inadequate for consideration of the matter and reply by the beneficiary and reviewing office processing time.

The only exceptions to this rule are:

(1) the overpayment is based on an annual report by the beneficiary; or

[Footnote continued on page 53a]

Code of Federal Regulations, 20 C.F.R. §§ 404.901

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[2] [Continued]

(2) the overpayment results from the superendorsement procedures under Section 205(n) of the Act whereby payment of a combined check is made to the survivor. . . . In the above two situations immediate adjustment action is taken.

§ 5503(c) provides:

If the person responds raising some question about the correctness of the determination of overpayment, or raises a question about recovery, waiver or partial adjustment, the DO will obtain the necessary evidence and prepare a recommendation to the reviewing office for disposing of the case. *Thus, if the person liable requests reconsideration of the substantive determination and it appears that the determination will be affirmed, the DO will develop the possibility of waiver of adjustment or recovery of the overpayment at the same time it receives evidence to resolve the request for reconsideration. This is necessary since, if the substantive determination is affirmed the Reconsideration Determination will cover both issues* (§ 8737). (Emphasis original).

When development is initiated for reconsideration of the overpayment determination, for waiver, or for partial adjustment, withholding to recoup the overpayment will be further deferred and payment will be continued until development has been completed, if the beneficiary is otherwise entitled to benefits. If development will not be completed before the expiration of the initial 30-day deferral period, the DO will . . . advise the reviewing office.

After this case was heard, the Administration reported that by January 1, 1975, overpayments based on beneficiaries' annual reports [§ 5503(b)(1)] will not be an exception to the rule of § 5505(b).

et seq. (1973).[3] The Plaintiffs in this class action claim that these procedures and regulations deny them due process of law under the Fifth Amendment because their benefits are reduced or suspended without adequate notice of the reasons for the recoupment, without adequate notice of their right to reconsideration, waiver, or partial adjustment,[4] and without a hearing prior to the recoupment. Defendants contest the Plaintiffs' constitutional and jurisdictional claims.

Facts:

This court has divided the Plaintiff class into two subclasses. Represented by Plaintiffs Silva, Ortiz, and Vaquilar, the first subclass consists of all social security old-age beneficiaries, resident in the State of

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[3] §§ 404.901 *et seq.* of Social Security Administration Regulations No. 4, set forth a four-step administrative review including an initial determination (§ 404.905); a reconsidered determination (§ 404.914); an administrative hearing *de novo* before an independent administrative law judge (§ 404.917); review by the Appeals Council of the Social Security Administration, (§ 404.945). After exhaustion of these administrative remedies, 42 U.S.C. § 405(g) provides for judicial review.

The initial overpayment determination notice must state the basis of the determination and inform the recipient of his right to reconsideration (§ 404.907). The initial determination is final unless a written request for reconsideration is filed (§ 404.908). The reconsideration decision is final unless a hearing is requested in writing (§ 404.914).

[4] Partial adjustment is a recoupment method whereby part of monthly benefits are withheld. It is permitted (not mandated) by 20 C.F.R. § 404.502a if certain conditions are met.

Hawaii, whose exposure to recoupment is based upon their own annual earnings reports.[5] Represented by Plaintiffs Elliot, Gaines, and Yamasaki, the second subclass consists of all social security old-age and disability benefit recipients, resident in the State of Hawaii, whose exposure to recoupment is based upon evidence other than annual earnings reports.[6]

Named Plaintiffs of subclass one all received an Administration form letter indicating that based upon their annual earnings reports for the preceding year, a specified overpayment had occurred and that their subsequent benefit payments would be reduced or totally suspended over a specified period. There was some notice of the right to reconsideration and waiver.[7] Plaintiffs believed themselves to be not liable

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[5] Recipients of old age retirement benefits are required to file annual earnings reports; and under 42 U.S.C. § 403(b) and (f), their monthly benefits may be reduced if their reported annual earnings are in excess of specified levels. Disability recipients are not required to file annual earnings reports.

[6] The exposure of Plaintiffs Elliott and Gaines to recoupment is based upon the Administration's discovery of its own alleged error. Plaintiff Yamasaki's exposure is based upon information supplied to the Administration by the insurance carrier of her unemployment compensation insurance.

[7] The pertinent parts of the form letter are as follows:

> "If you believe that this determination is not correct, you may request that your case be reexamined. If you want the reconsideration, you must request it not later than 6 months from the date of this notice. You may make any such request through any social security office.
>
> If additional evidence is available, you should submit it with your request.
>
> To recover the overpayment, we shall withhold your benefits beginning with the check you would normally receive in ————. The next check that you will receive after the full overpayment has been withheld will be for $——. It will be sent to you about ————. Thereafter, your regular monthly benefits of $—— will be resumed.
>
> Under social security law, any overpayment must be withheld from benefits or paid back unless *both* of the following are true:
>
> 1. The overpayment wasn't your fault in any way and you cashed the check(s) because you thought they were correct, *and*
> 2. You couldn't meet your necessary living expenses if you had to pay back the overpayment or have it withheld from your social security benefits; or it would be unfair for some other reason.
>
> To decide whether repayment would cause you financial hardship, we shall need a statement of your assets, and monthly income, and expenses. If you think you meet both conditions, call, write, or visit any social security office within 30 days from the receipt of this letter. Please take this letter with you if you visit the office. Unless we hear from you within 30 days, we shall withhold benefits as indicated above."

for any overpayment, not at fault in causing the overpayment, and unable to repay the amount due; they personally contacted local Social Security Administration offices within thirty days of receipt of the form letter. At that time, none were advised that appropriate forms requesting waiver, reconsideration, and partial adjustment were available to initiate administrative action, and none actually filed the re-

quisite forms within thirty days.[8] Currently, the Administration has completed recoupment against two of these Plaintiffs while deferring recoupment against the other pending the disposition of this case. Plaintiffs of subclass one have done all that reasonably could be expected of them to exhaust their administrative remedies.[9]

Named Plaintiffs of subclass two received overpayment notices more than thirty days before recoupment was to begin. The notice to Plaintiff Elliott set forth that the overpayment determination was based

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[8] One Plaintiff (Vaquilar) did immediately ask for and receive a partial adjustment of the amount to be withheld monthly. Moreover, acting on advice of counsel, he completed and filed the requisite forms requesting waiver and reconsideration more than thirty days after receipt of the overpayment notice. However, trial testimony indicates that timely completion of the forms would not have changed the Administration's disposition of the first subclass cases.

[9] The general rule is that a litigant must exhaust his administrative remedies, if such remedies exist, before invoking federal jurisdiction. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938). However, the exhaustion requirement is excused if a) the administrative remedy is wholly inadequate, and the federal question is plain, or b) exhaustion would cause irreparable harm, as by prejudicial delay. *See* Martinez v. Richardson, 472 F.2d 1121, 1125 (10th Cir. 1973) and authorities cited therein. *See also* Note, *Federal Jurisdiction Over Challenges To State Welfare Programs*, 72 COL. L. REV. 1404, 1438-40 (1972). In this case, exhaustion of administrative remedies is excused on either of the above grounds. The federal question is clear; obtaining administrative relief on the due process issues raised would be a lengthy process during which many of the aged and disabled Plaintiffs in both subclasses would suffer and some would die.

upon her receipt of both retirement and disability benefits when she was entitled to only disability benefits.[10] The notice to Plaintiff Gaines indicated that "duplicate payments" over specified dates was the reason for the overpayment finding.[11] The notice to Plaintiff Yamasaki specified "a processing error" as the cause of the overpayment.[12] All three named Plaintiffs received some notice of the right to reconsideration and waiver.[13] The Plaintiffs believed themselves to be not liable for any overpayment, not at fault in causing the overpayment, and unable to repay the amount claimed; they contacted local Administration offices within thirty days after receipt of the overpayment notice. At that time, none were advised that appropriate forms requesting waiver, reconsideration, and partial adjustment were available to instigate administrative action, and none actually filed the requisite forms within thirty days.[14] Presently, recoupment against Elliott and Gaines has been deferred pending a final disposition of this case,

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[10] Affidavit of Bernard Popick, para. 12.

[11] Plaintiff's Exhibit, P-15.

[12] Affidavit of Nancy Yamasaki, Exhibit A.

[13] The pertinent parts of the initial notice were virtually the same as those reprinted in note 7, *supra*.

[14] The three subclass two Plaintiffs, acting upon advice of counsel, eventually did complete and file the requisite forms after the initial thirty days had elapsed. Trial testimony indicates, however, that timely completion of the forms would not have altered the Plaintiffs' current status. *See also* note 9, *supra*.

while recoupment against Plaintiff Yamasaki has been completed. Plaintiffs of subclass two have done all that reasonably could be expected of them to exhaust their administrative remedies.

In summary, the Administration's regulations and procedures, and the Plaintiffs' histories in this case, show that recipients in both subclasses subject to recoupment receive recoupment notices which set out the basic reason for the recoupment, the possibility of reconsideration, the conditions for waiver, and the need to consult the local Administration office within thirty days if they wish to complain. For subclass one Plaintiffs, (at least until January, 1975), recoupment begins immediately after the initial overpayment decision is made. For subclass two Plaintiffs, the notice is sent thirty days before actual recoupment begins. In practice, actual adjustment may at the discretion of the Payment Center be extended beyond 30 days when more time is needed to consider and process the matter. After the first determination is made, if reconsideration or waiver is requested, recoupment is further deferred until those issues are determined on the basis of any documentary evidence submitted. Finally, a post-recoupment hearing is possible should the claimant wish to seek additional review.[15]

The initial overpayment and recoupment notice sent to beneficiaries does not set forth the forms

[15] *See* 42 U.S.C. § 405(b) (1969), and 20 C.F.R. § 404.917 (1973).

needed for reconsideration and waiver, or information about how to complete them. The information and forms missing in the initial notice are not generally made available when the claimant consults his local Administration office. When reconsideration or waiver consideration is requested, the Administration's decision is based upon a claimant's *ex parte* presentation of documentary evidence on an issue which he may understand only nebulously. Many of these claimants are elderly and disabled people whose capacities may frustrate an effective documentary presentation of their case. No oral hearing is given prior to the beginning of recoupment, and any deferral of recoupment beyond 30 days after the date of the initial notice lies completely within the discretion of the Administration. Should a claimant convince the Administration to reverse itself *ex parte* on the overpayment issue, a reduced or suspended payment may ensue with a refund coming a month or more later.

Statistics provided by the Defendant[16] in this case indicate the following:

(a) In 1970 there were overpayments in approximately 1,250,000 cases.

(b) Of these 1,250,000 overpayments, there were requests for reconsideration in approximately 12,000 cases.

[16] Affidavit of Bernard Popick, Director of the Bureau of Disability Insurance of the Social Security Administration, Department of Health, Education, and Welfare, para. 36.

(c) Of the 12,000 reconsideration determinations with respect to overpayments, there were approximately 8,250 reversals and approximately 3,750 affirmances.

(d) Of the 3,750 reconsideration affirmances with respect to overpayments, there were requests for hearing in approximately 1,600 cases.

(e) Of the 1,600 cases that went to hearing with respect to overpayments, there were reversals in approximately 560 cases and affirmances in 1,040 cases.

Stated another way, these statistics mean:

(a) less than one per cent of the beneficiaries in overpayment status contest the matter.

(b) Of those who do contest the initial overpayment determination, about sixty-nine per cent succeed in getting the Administration to reverse itself.

(c) about forty-three per cent of those whose overpayment status is affirmed upon reconsideration seek an oral (post-recoupment) hearing.

(d) of those who get an oral hearing, more than one-third succeed in getting the Administration to reverse itself.

(e) overall, of that small percentage of claimants questioning the overpayment determination, about seventy-three per cent (8,250 + 560 out of 12,000) finally succeed in obtaining relief.

It is quite clear from the above that when the claimant feels he has a strong enough case to question the Administration's initial overpayment determination,

there is a very substantial chance that the Administration will eventually reverse itself. What is saddest and perhaps most important about this fact is that many social security recipients, like the Plaintiffs here, depend upon their full monthly benefit payments for subsistence.[17] Erroneous recoupments often cause the aged and infirm drastic hardship.[18]

Jurisdiction:

The Defendants have moved for dismissal for lack of subject-matter jurisdiction. Plaintiffs assert that federal jurisdiction exists under 28 U.S.C. § 1331(a) (1966), 28 U.S.C. § 1361 (Supp. I, 1972), and 5 U.S.C. § 701 *et seq.* (1967) (hereinafter the "A.P.A."). While § 1361 [19] may have been intended to increase the availability of mandamus jurisdiction beyond that under common law,[20] even under the

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[17] The Administration's own CLAIMS MANUAL § 5000 states, "Most people who get an RSDI check depend upon it for the necessities of life."

[18] For example, Plaintiff Elliott was forced to seek emergency welfare assistance from the State of Hawaii after her social security payment for June 1972 was withheld.

[19] § 1361 states: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty to the plaintiff."

[20] Whether § 1361 was supposed to expand mandamus jurisdiction beyond common law rules is an open question. *Compare* Burnett v. Tolson, 474 F.2d 877, 880 n. 5 and n. 6 (4th Cir. 1973) *with* Peoples v. U. S. Dept. of Agriculture, 427 F.2d 561, 565 (D.C. Cir. 1970). *See generally*, 7B J. MOORE, FEDERAL PRACTICE § 1361, at 536 (2d ed. 1973).

traditional rules for mandamus writs, § 1361 applies to this case.[21] At common law, mandamus would issue when three elements coexisted, namely, 1) a clear right in the plaintiff to the relief sought; 2) a clear duty on the part of the defendant to do the act in question;[22] and 3) the lack of another adequate remedy. *Carter* v. *Seamans*, 411 F.2d 767, 773 (5th Cir. 1969).

As to the third requirement, the Plaintiffs, if denied federal jurisdiction, may not have an adequate remedy elsewhere, *see Burnett* v. *Tolson*, *supra* note 20, at 82-83. The state courts may not be able to issue the requested injunctive relief, *see State of*

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[21] The court does not decide the 28 U.S.C. § 1331(a) and 5 U.S.C. § 701 *et seq.* issues raised by the Plaintiffs, but notes in passing that support exists for either jurisdictional base. 5 U.S.C. § 706(2) applies to this case, and the A.P.A. has been viewed as a jurisdictional grant independent of other statutes. Bass v. Richardson, 338 F. Supp. 478, 482 (S.D. N.Y. 1971); (for authorities *pro* and *con*) *see generally*, Aguayo v. Richardson, 473 F.2d 1090, 1101-02 (2d Cir. 1973); Mills v. Richardson, 464 F.2d 995, 1001 n. 9 (2d Cir. 1972). Although the amount in controversy requirement may preclude § 1331(a) jurisdiction, some courts have indicated that when the deprivation of constitutional rights is at issue, the jurisdictional amount is automatically satisfied. *Accord*, Spock v. *David*, 469 F.2d 1047 (3d Cir. 1972); Cortright v. Resor, 325 F. Supp. 797, 809 (E.D. N.Y. 1971). *Contra*, Lynch v. Household Finance Corp., 405 U.S. 538, 547 (1972). *See generally*, Burnett v. Tolson, *supra* note 20, at 880 n. 4.

[22] This traditional requirement is sometimes stated as a duty plainly and positively ascertained, and free from doubt. Wilber v. U.S. *ex rel.* Kadrie, 281 U.S. 206, 218-19 (1930); Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364, 367 (10th Cir. 1966).

Alabama v. *Rogers*, 187 F.Supp. 848, 852 (M.D. Ala. 1960); R. Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L. J. 1385 (1964), and any removal to a federal court from a state court would lie within the defendants' sole discretion. Moreover, the first and second requirements are met when the application of a Supreme Court ruling to the instant case clearly shows the existence of plaintiff's constitutional right and its denial by the defendant. *Mead* v. *Parker*, 464 F.2d 1108 (9th Cir. 1972); *Burnett* v. *Tolson*, *supra* note 20; *Daigle* v. *Warner*, 348 F.Supp. 1074 (D.C. Hawaii 1972), *rev'd* on non-jurisdiction grounds, —— F.2d —— (9th Cir. 1973).[23] While the applicability of the relevant Supreme Court ruling should be beyond doubt in the opinion of the district court judge, it need not be so certain as to preclude a different opinion from another court. For example, in *Daigle*, *supra*, the Chief Judge of this District Court under § 1361 applied *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972) to summary courts-martial. The Ninth Circuit later reversed, differing with the Dis-

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[23] In *Mead*, a case wherein the adequacy of a prison library was challenged, the Ninth Circuit held that § 1361 jurisdiction applied because Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970) *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971) had established constitutional standards for prison libraries. In *Burnett*, the Fourth Circuit asserted § 1361 jurisdiction in a case wherein the prior refusal to allow pamphlet distribution in a public area on a military base was said to be governed by Flower v. U.S., 407 U.S. 197 (1972) which declared unconstitutional the arrest (under 18 U.S.C. § 1382) of a leafleteer previously barred from a military base.

trict Court's use of *Argersinger* without attacking its assertion of § 1361. In this case, the Plaintiffs rely upon *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (hereinafter "*Goldberg*") to establish the existence of the constitutional right to adequate notice and prior hearings in Administration recoupment cases. One court has already approved § 1361 jurisdiction and the application of *Goldberg* to the termination and recoupment of medicare benefits under Administration regulations similar to those involved in this case. *Martinez* v. *Richardson, supra* note 9. Accordingly, the applicability of *Goldberg* to this case is sufficiently apparent to establish for § 1361 jurisdictional purposes the plaintiff's clear right and the defendant's clear duty.[24]

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[24] In Knuckles v. Weinberger, —— F. Supp. —— (N.D. Cal. (1973), wherein the regulations under § 404 of the Act were challenged on due process grounds, Judge Wollenberg distinguished the *Mead* case, and ruled that § 1361 jurisdiction did not exist because the applicability of *Goldberg* to this type of case was not certain enough to support mandamus jurisdiction. With all due respect to Judge Wollenberg, I disagree that the application of *Goldberg* is unclear, and that *Mead* is distinguishable. The court's awareness in *Mead* that the library in question was more deficient than the one in *Gilmore* does not necessarily reflect an understanding that § 1361 jurisdiction applies only when the constitutional infirmity is absolutely identical to (in kind) and exceeds (in degree) that ruled upon in a Supreme Court case. Rather the awareness of the greater library deficiency in *Mead* may have been directed towards the statement of claim issue in the case: "We have no doubt that, under *Gilmore* v. *Lynch, supra*, and *Johnson* v. *Avery* 1969, 393 U.S. 483, 89 S.Ct. 747, 21 L.E.2d 718, the named petitioners have stated a prima facie case under both theories," *supra*, at 1111. When discussing § 1361 jurisdiction, the *Mead* court stated (without mentioning *Gilmore*) that although § 1343 would not apply, . . . "the wrong done, if any, is just as much a violation of the federal Constitution as if done by a state official," *supra*, at 1111. The court's qualification of the wrong by "if any" suggests that the Plaintiff's right and the Defendant's duty need not be as absolutely certain as Judge Wollenberg would seem to require.

Due Process and Hearings Prior to Recoupment:

Goldberg establishes the principle that when the impact of an erroneous administrative decision upon the individual is so severe as to deprive him of the means by which to live, due process requires that the individual have an opportunity to be heard and to cross-examine witnesses before any adverse decision is effected. Specifically, *Goldberg* held that a hearing had to be afforded the individual before his state welfare benefits were terminated. In reaching its decision, the *Goldberg* Court focused upon three considerations: The impact of an erroneous decision upon the individual, the government's interest in fulfilling the purpose of welfare legislation by protecting against administrative mistakes, and the government's interest in conserving the public fisc and minimizing administrative burdens. The *Goldberg* Court found that "termination of [welfare] aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits," at 264. It also found that important governmental interests were served by ensuring that welfare was given to eligible recipients without interruption. Finally, it found that

the additional burden on the government's administration and fisc did not outweigh the first two considerations in favor of providing a prior hearing.

The application of *Goldberg* to this case is simply inescapable.[25] Since most social security recipients

[25] In Richardson v. Wright, 405 U.S. 208 (1972) (Brennan, Douglas, and Marshall, JJ., dissenting), three Justices dissented to the Court's decision to decline ruling on the application of *Goldberg* to the termination of social security disability benefits. The dissenters also expressed the view that *Goldberg* should be so applied. *Accord,* Note, *Procedural Due Process and the Termination of Social Security Disability Benefits,* 46 S. CAL. L. REV. 1263 (1973). *Goldberg* has also been applied in public housing cases. *See e.g.,* Caulder v. Durham Housing Authority, 433 F.2d 998 (4th Cir. 1970), *cert. denied,* 401 U.S. 1003 (1971).

The cases cited by the Defendant are clearly distinguishable. It is true that in Kelly v. Wyman, 294 F.Supp. 893, 901 n. 20 (S.D. N.Y. 1968), *aff'd sub nom. Goldberg,* the court did suggest in *dicta* that its ruling might not apply to the federally administered Old-Age, Survivors, and Disability Insurance Program. However, this was not an issue in the case, and the Supreme Court in *Goldberg* expressed no opinion on the issue. In Torres v. N.Y. State Dep't. of Labor, 333 F.Supp. 341 (S.D. N.Y. 1971), *aff'd,* 405 U.S. 949, *reh. denied* —— U.S. ——, 41 U.S.L.W. 3475 (March 6, 1973), the court ruled that due process did not require a hearing prior to the suspension or termination of unemployment benefits; but in that case, the two named Plaintiffs were afforded a hearing prior to termination of their benefits, and new regulations made the issue moot as to other plaintiffs. Messer v. Finch, 314 F.Supp. 511 (E.D. Ky. 1970) held that social security disability benefits could be suspended without a prior hearing, but that judgment was vacated for mootness, 400 U.S. 987 (1971). Anderson v. Finch, 322 F.Supp. 195 (N.D. Ohio 1971) refused to apply *Goldberg* to social security benefits. The Sixth Circuit remanded

depend upon their full benefits for the necessities of life,[26] the adverse impact of an erroneous suspension or reduction upon them is great.[27] Starvation

for reconsideration in light of *Goldberg.* 454 F.2d 596 (6th Cir. 1972).

Recently, when the recipient of unemployment compensation was given an informal personal interview prior to the termination of benefits and the record reflected the absence of a factual dispute or the misapplication of rules and regulations, the Ninth Circuit reversed the lower court and held that a full evidentiary hearing prior to benefit termination as in *Goldberg* was not required. Crow v. Cal. Dep't. of Human Resources Dev., No. 71-1045 (9th Cir., Dec. 14, 1973). The court distinguished *Goldberg* on the grounds that "grievous loss" was not involved in terminations of unemployment compensation. Crow is clearly inapplicable to the case at hand: The Plaintiffs received no prior informal hearing and this court has found that recipients of social security benefits are likely to suffer "grievous loss" when benefits are erroneously terminated.

[26] *See* note 17, *supra.*

[27] The Supreme Court has found an adverse impact sufficient to impose a prior hearing requirement in circumstances far less dire than when necessities of life are concerned, namely, when a deprivation of property was involved. Though a hearing was afforded only three days after the repossession of goods (*i.e.,* a stove and stereo), the Court held that due process was violated because there was no hearing prior to the repossession. Fuentes v. Shevin, 407 U.S. 67 (1972). Similarly, when a state revoked the license of uninsured motorists involved in accidents and the only prior hearing given did not consider the motorist's possible fault, the Court ruled, ". . . before the State may deprive petitioner of his driver's license and vehicle registration it must provide a forum for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident." Bell v. Burson, 402 U.S. 535, 542 (1971).

may be slower if benefits are reduced or suspended rather than terminated as in *Goldberg*,[28] but some recipients will suffer nonetheless. As the *Goldberg* Court noted, the government has an interest in welfare as a guard "against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity," at 265. So is the Social Security Act ". . . designed for the protection of society, and enacted to alleviate the burdens which rest on large numbers of the population because of the insecurities of modern life, particularly those accompanying old age, unemployment, and disability, . . ." *Sayers* v. *Gardner*, 380 F.2d 940, 942 (6th Cir. 1967).[29] As with welfare, the same governmental interests that counsel the provision of social security benefits, counsel as well its uninterrupted provision to those eligible to receive it, and pre-recoupment hearings are indispensable to that end. *See Goldberg*, at 265. Finally, *Goldberg* suggests that the government's objection to pre-recoupment

[28] It has been suggested that *Goldberg* may be distinguishable from other cases because it involved terminations of benefits, not reductions. *See* Wheeler v. Montgomery, 397 U.S. 280, 284-85 (1970) (Chief Justice Burger dissenting); Daniel v. Goliday, 398 U.S. 73 (1970). However, at least one court has intimated that reductions in grants as recoupment for past advances would be covered by *Goldberg*. Hagans v. Wyman, 462 F.2d 928 (2d Cir. 1972), *cert.* to 2d Cir. *granted sub nom.* Hagans v. Lavine, —— U.S. ——, 37 L. Ed.2d 396 (1973).

[29] *See also* Note, *Procedural Due Process and The Termination of Social Security Disability Benefits*, *supra* note 25.

hearings on administrative and fiscal burden grounds cannot outweigh the arguments in favor of such hearings.[30] This seems especially true in this case: The Administration's own statistics indicate that only a small percentage of overpayment cases will need to be contested beyond the "paper" hearing stage.[31] Pre-recoupment hearings may also reduce the number of post-recoupment hearings necessary.[32]

There are other compelling reasons why the mandate of *Goldberg* must be applied to social security cases. At the heart of the right to due process lies

[30] ". . . fiscal considerations are always relevant, but seldom if ever decisive in cases of this sort." Crow v. Cal. Dep't. of Human Resources, 325 F. Supp. 1314, 1317 (N.D. Cal. 1970) (termination of unemployment compensation without a prior hearing), *cert. denied* 408 U.S. 924 (1972), *rev'd* on other grounds, —— F.2d —— (9th Cir. 1973).

[31] *See* text accompanying note 16, *supra*. While the court finds that a prior oral hearing is constitutionally necessary when requested, the Administration may still use its current "paper" hearing wherein documents filed by the claimant are reviewed to select out those cases which may be reversed without a hearing. The Administration has claimed that the increased cost of continuing benefits until a hearing is had could be $35 million. However, this figure makes two dubious assumptions, namely that everyone subject to recoupment will request a hearing, and that all will take two years to complete the appeals process. The first assumption is questionable in light of current statistics on recipients who contest overpayment determination. *See* text accompanying note 16, *supra*. The second "two year" assumption assumes that the current time for the full appeals process could not be shortened somewhat by the Administration itself.

[32] *Compare*, Richardson v. Wright, *supra* note 25, at 223 (dissenting opinion).

the recognition of the need for a fair determination of issues and the hope of minimizing mistakes. In this case, the chance of administrative error is great.[33] In *Kelly* v. *Wyman, supra* note 25, the district court was impressed by the fact that post-termination hearings resulted in administrative reversals 36% of the time; in this case, reversals at the post-recoupment hearing stage occur more than one-third of the time.[34] Furthermore, the procedural safeguards which *Goldberg* found constitutionally insufficient for lack of a prior hearing were more stringent than those of the Administration.[35] It is thus not surprising that one court has approved the application of *Goldberg* to procedures similar to those here at issue. *See Martinez* v. *Richardson, supra* note 9. *But see Mills* v. *Richardson, supra note* 21, at 1001 (*dicta*).

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[33] *See* text accompanying note 16, *supra*. These figures of course should not be taken to impugn the competence of the Administration; rather, they attest to its fairness and the complexity of making initial overpayment determinations.

[34] *See* text accompanying note 16, *supra*.

[35] Under the procedure challenged in *Goldberg*, a welfare termination decision was made only after the recipient discussed the case with a caseworker, (a safeguard not present in this case). A unit supervisor then reviewed the caseworker's termination decision. If the supervisor concurred, the recipient was given seven days to request another review by a higher official. Like the Plaintiffs here, the welfare recipient could submit a written statement supporting his case to this higher official. If the higher official felt termination was unwarranted, welfare aid stopped immediately. The welfare recipient, like the Plaintiffs here, could then request a post-termination hearing.

Attempts to distinguish *Goldberg* on the ground that fact issues are not present in recoupment cases, or on the ground that the evidence involved is more reliable, are futile. Issues of fact arise in virtually all contested recoupment situations.[36] To predict when an issue of fact will not be present on a case by case basis is impossible. Although the district court in *Kelly* v. *Wyman, supra* note 25, at 905, may have been influenced in its decision by the fact that welfare terminations sometimes were based upon rumors or "tips", the *Goldberg* Court did not base its decision on the possibility that flimsy evidence might underlie a termination decision. However reliable the evidence may be, when the adverse administrative determination depends upon the resolution of factual issues and the application of legal rules to

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[36] The *Goldberg* Court apparently limited its holding to situations where issues of fact are present, at 268 n. 15. However, subsequent cases suggest that hearings are required by due process even if no issues of fact are present. In Yee-Litt v. Richardson, 353 F. Supp. 996 (N.D. Cal. 1973), *aff'd* —— U.S. ——, 93 S.Ct. 2753, 37 L.Ed.2d 152 (1973) the plaintiffs challenged on due process grounds a California regulation which authorized the termination of welfare aid whenever a Chief Referee determined that only issues of policy and no issues of fact or judgement were present. Judge Carter held that under *Goldberg* this regulation violated due process "because of the inherent difficulties in using this fact policy distinction," at 999. Similarly, in Mother's & Children's Rights Organization v. Sterrett, 467 F.2d 797 (7th Cir. 1972), the Court held that even when welfare benefit terminations were based upon pure questions of law, reasonable opportunity for argument had to be given, although a full evidentiary hearing was not necessary.

the facts found that is enough to invoke due process hearing requirements.[37]

Therefore, the court finds that the Administration's recoupment regulations and procedures here challenged violate the Plaintiff's right to due process of law, and orders that henceforth when requested [38] the Plaintiffs of both subclasses be given an oral hearing prior to recoupment.[39] At the hearing, the correctness of the overpayment determination and the recipient's statutory right to waiver under 42 U.S.C. § 404(b) (1969) must be examined. However, since under 20 C.F.R. § 404.502(c) (1973), partial adjustment is not a mandate, but lies within the un-

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[37] *See* Richardson v. Wright, *supra* note 25, at 216 (dissenting opinion).

[38] The Plaintiffs due process right to a hearing may of course be waived by them. It is for the Administration to decide whether obtaining written waivers of the right to a hearing in all, some, or no cases is advisable, but the court notes in passing that written waivers would minimize litigation over whether a recipient knowingly and intelligently decided not to request a hearing.

[39] At first blush the need for a prior hearing in annual report cases (subclass one) may be doubtful because the reports are filed by the claimants themselves and overpayments are determined by the mechanical application of a statutory earnings standard. However, this is but another way of saying that annual report cases involve "more reliable" evidence than others. Even if this supposed reliability were a factor, nothing makes a report more unreliable than when its own author says it is a mistake. In fact, it may be that because overpayments based on annual reports present relatively straight forward fact issues, the claimant will seek an oral hearing only when a mistake is clear.

fettered discretion of the Administration even when the requisite conditions are met, a hearing need not be given on the partial adjustment issue.[40]

The pre-recoupment hearing need not take the form of a judicial or quasi-judicial trial, but it must allow the claimant to present his case orally, to submit evidence with witnesses or documents, and to cross-examine witnesses against him. Representation by legal counsel or other persons is neither required nor prohibited. The hearing officer should

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[40] The Plaintiffs have no due process right to a hearing on partial adjustment because they have no protected property interest in it. In Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972), when a university did not rehire a teacher and was under no contractural, statutory, administrative or other obligation to decide the rehiring issue according to any procedure or standard, but could exercise its unfettered discretion, the Court held that the teacher had no constitutional right under the Fourteenth Amendment to a statement of reasons and a hearing on the university's decision not to rehire him. The Court indicated that a right to procedural due process exists only when a protected interest of liberty or property is involved. As to a protected property interest, the Court stated, "To have a property interest in a benefit, a person clearly must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it," at 577. There is no interest of liberty at stake in a partial adjustment determination; and even if a claimant meets the conditions for partial adjustment, he has no "legitimate claim of entitlement to it" since the Administration in its discretion can still rule against him.

Furthermore, since no due process right covers the partial adjustment problem, this court cannot say that partial adjustment or the form needed to file for it, must as a constitutional matter be mentioned in the initial overpayment notice.

not have participated in making the determination under review; he should base his decision solely on the legal rules and evidence adduced at the hearing; he should state the reasons for his decision and the evidence relied upon. *Goldberg*, at 266-71.

Due Process and Notice:

Since a constitutional right can be waived only knowingly, the Plaintiffs must be notified of their due process right to request and receive a pre-recoupment hearing on the overpayment and waiver issues. Notice of that right must be stated plainly and obstrusively in the initial overpayment letter. Furthermore, the initial notice must describe the claimant's right at any hearing to be represented by a lawyer or other person, present evidence, present witnesses in his behalf, cross-examine adverse witnesses, be afforded a fair and impartial hearing examiner, examine all documents prior to and during the hearing, and be given a prompt decision by the decisionmaker.

Due process also requires timely, adequate, and detailed notice of the reasons for an initial overpayment determination. *Goldberg*, at 267. In *Goldberg*, the Court found, "New York employs both a letter and a personal conference with a caseworker to inform a recipient of the precise questions raised about his continued eligibility. Evidently the recipient is told the legal and factual bases for the Department's doubts. This combination is probably the most effective method of communicating with

recipients," at 268. Since the Administration's current procedures do not include a caseworker interview, the social security recipient may not be as fully apprised of the legal and factual bases for the overpayment finding as the welfare recipient was in *Goldberg*.

In annual report overpayment cases involving subclass one Plaintiffs, the recipients are presumed to be familiar with their own reports and the reasons for filing them. The reverse side of the current initial notice explains basically how withheld amounts are determined, and the notice's invitation to consult local Administration offices when questions arise is a necessary and added protection. Subclass two Plaintiffs present a more difficult notice problem. The myriad circumstances and diverse information which may underlie an overpayment determination make it impossible for this court to define what is and is not adequate notice for all subclass two cases. To indicate (as the reason for the overpayment decision) a "duplicate payment" over specified periods may be enough notice for the claimant, but a stated reason such as "processing error" may not be.[41] However, it is reasonable to assume that subclass two Plaintiffs, and subclass one Plaintiffs, who doubt the overpayment, will consult their local Administration office for clarification.

However, in light of the foregoing, the Administration's initial notice does not complete its duty to

[41] *See* text accompanying notes 11-12, *supra*.

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inform the subclass one and two Plaintiffs about the reasons for an overpayment determination. Those Plaintiffs who consult their local Administration office to contest or inquire about the alleged overpayment must receive any additional information which the Administration has.[42] The Administration must inform the Plaintiffs requesting a hearing about all the pertinent details, laws, and regulations supporting the Administration's case far enough in advance to afford the claimant sufficient time to prepare for the hearing.[43]

Finally, while the Administration's current notice adequately informs the recipient of the possibility of reconsideration and waiver, it does not indicate what requisite forms must be completed. The record indicates that even those recipients seeking aid at a local office are not provided with information about or copies of the reconsideration and waiver forms. These deficiencies must be remedied. Claimants fail-

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[42] Normally when an administrative agency is about to take action adverse to a citizen, due process requires that the citizen be informed of the evidence upon which the agency relies so that he can rebut that evidence effectively. *See* Langevin v. Chenango Court, Inc., 447 F.2d 296, 300 (2d Cir. 1971); Escalera v. N. Y. City Housing Authority, 425 F.2d 853, 862 (2d Cir. 1970); *cert. denied,* 400 U.S. 853 (1970).

[43] While the text for procedural due process is one of fundamental fairness in the light of the total circumstances, due process always requires that a reasonable opportunity be given the individual to prepare for and meet the case against him. *See e.g.,* Whitfield v. Simpson, 312 F.Supp. 889, 894 (E.D. Ill. 1970).

ing to file the required forms may lose their case for failure to comply with administrative procedures. Therefore, the initial overpayment notice should specify the reconsideration and waiver forms which must be requested from the local office. The local office also has the duty to inform inquiring claimants about the requisite forms, to provide them with those forms if requested, and to assist in their completion. Accordingly:

Judgment may be entered providing that Defendant Weinberger, his successor, his agents and employees at the Social Security Administration's Payment Centers, and all persons in active concert or participation with them shall be restrained and enjoined from reducing, terminating, or suspending social security old age and disability benefits accruing to Plaintiffs and their class without affording them an opportunity for a hearing before any reduction, termination, or suspension is effectuated;

That Defendant Weinberger, his successors, his agents and employees at the Social Security Administration's Payment Centers, and all persons in active concert or participation with them shall restore any and all money withheld since June 22, 1972, without a prior hearing, from Plaintiffs NANCY YAMASAKI, ISABELLE ORTIZ, JOHN V. VAQUILAR, RAYMOND GAINES, and JORDAN S. SILV pending the holding of a pre-adjustment hearing in each of their individual cases;

That the Defendants shall submit to this court, for its approval, a copy of the proposed notice to be

given to the members of the class informing them of the judgment herein, and a copy of the revised rules, regulations, and procedures which they will adopt to conform with the dictates of the judgment herein; and

That this court will retain jurisdiction over this case to order any further action it may deem appropriate and just in light of the decision herein.

The foregoing constitutes the Findings of Fact and Conclusions of Law required by Rule 52(a) of the Federal Rules of Civil Procedure.

DATED: Honolulu, Hawaii, February 4, 1974.

/s/ Samuel P. King
United States District Judge

APPENDIX G

I. Pertinent Provisions of the Social Security Claims Manual

5500. Overpayments Defined

"Overpayment" means payment of any sum in excess of the amount to which the person was entitled or a payment where nothing was due. When a benefit check is cashed by means of forgery, it is technically not an overpayment of title II funds. In such cases section 204 of the Act will not apply with respect to either recovery or waiver of recovery or adjustment of the incorrect payment. The recovery of such amounts is the responsibility of the Treasury Department. However, if the SSA incorrectly certifies the address of someone other than the intended payee and the recipient who has the same or similar name as the beneficiary cashes the check, the negotiation is not considered to be a forgery. Under such conditions recovery or waiver rests with SSA (See § 5521).

Liability for repayment of an overpayment must be determined in all cases. Where benefits are paid directly to a beneficiary, liability falls on the overpaid beneficiary. Where a representative payee receives the

payment, or when the LS has been paid to a funeral home, guides for determining liability are set out in §§ 5511–5512. Where the overpaid person dies before recovery is made, see § 5530 for liability of decedent's estate.

A benefit paid on the basis of an erroneous report by the Deparment of Defense of the death of an individual in the line of duty while he is a member of the uniformed forces on active duty will be considered a correct payment for months prior to the month the SSA is notified that the individual is alive. (See § 5524.5)

The failure to deduct the premium obligation of an enrollee under Part B of title XVIII from his monthly benefit due to an error by the reviewing office of which they should reasonably have been aware is considered an overpayment subject to recovery or waiver under section 204 of the Act. (See § 10470.)

An overpayment also occurs when a payment of past due benefits is made to an individual and such payment has not been reduced by the amount of the attorney's fee payable directly to an attorney under section 206 of the Act. (See § 3526).

5501. Obligations of SSA When Overpayments Occur

Where an overpayment has been made, the SSA is required by sec. 204(a) of the Act to recoup such amounts by:

(*a*) Withholding benefits otherwise due the overpaid person on any E/R, or due other persons entitled to payments on the same E/R on which the overpayment was made; or

(*b*) Requesting the overpaid person or his estate to refund the amount in excess of the correct payment; or

(*c*) Any combination of (*a*) and (*b*).

However, if the person from whom recoupment is sought is not at fault and adjustment or recovery would cause financial hardship, or be inequitable, relief from repayment can be granted in accordance with sec. 204(b) of the Act, the waiver provision of the law.

Under the above provisions of the law, we must, on the one hand, safeguard the trust funds and attempt to make them whole by recovering benefits incorrectly paid. On the other hand, we must recognize the rights of beneficiaries to waiver of recovery or their need for relief by partial adjustment, when the facts justify such action.

5501.2 When to Limit Recovery Efforts—Tolerance Rule

(*a*) *General*

In pursuing collection of debts, there is a point of diminishing returns beyond which further collection efforts are not justified. For example, do not undertake costly efforts to recover debts involving insignificant amounts. Also, do not prolong recovery efforts if it is evident that the overpaid person does not have the financial means to repay.

Although no recoupment action will be taken where the tolerance rule applies, accept any voluntary refund by the beneficiary.

(*b*) *Tolerance Rule*

1. Overpayment $15.00 or less—if immediate adjustment is available, recover any overpayment which does not exceed $15.00, and notify the person of the action taken.

Immediate adjustment is available only if benefits for prior months (i.e., an underpayment) is due the person primarily liable for repayment and/or a lump-sum death payment is payable. Because of the advance notice of adjustment requirement, adjustment is not immediately available if benefits are payable for only the current and future months or if benefits are not currently due.

If immediate adjustment is not available, do not send a notice of overpayment. In such case there will be no attempt to recover the overpayment.

2. Overpayment $15.01 or Larger—If the overpayment exceeds $15.00, recovery will be attempted from the person primarily liable regardless of the method of recovery (i.e., adjustment or refund). Such overpayments will be processed under the usual rules.

5501.3 Application of Tolerance Rule

(*a*) *General*

The "$15 tolerance for limiting the collection of debts stated in § 5501.2 are applied to those overpayment cases processed manually. When overpayments are computer processed, letters requesting refund and proposing adjustment are generated even though the amount of the overpayment is $15 or less. Programing changes still have to be made to fully effectuate application of the tolerance.

In any case, where a beneficiary offers to refund the amount of the overpayment, accept it regardless of the amount (see § 5501.2).

(*b*) *District Office Procedures*

If a beneficiary contacts a district office about a request for refund or proposed adjustment processed by the computer where the amount of the overpayment is $15 or less, and raises a question about the correctness of the overpayment determination or about the recovery action, obtain form SSA–795 or an RC, and forward to the reviewing office. Take no additional development with respect to the overpayment determination or waiver. If adjustment has been proposed in such a situation, see §§ 5503.6–5503.65 concerning use of the SSA–2521 and/or SSA–3079.

(*c*) *Reviewing Office Procedures*

Upon receipt of information either from the DO or direct from a beneficiary where the beneficiary either fails to make refund of an overpayment of $15 or less processed by the computer or protests the adjustment action in such case, file the material in the claims folder. Advise the beneficiary that it will not be necessary for him to repay this amount, and, if adjustment has been proposed, see § 5503.6(b).

5502. How Overpayments Are Handled—General Definitions

(*a*) *Recovery*

This is a term that is often used to refer to all methods of obtaining the money that was overpaid.

These methods are:

(*1*) *adjustment*

If benefits are payable to the overpaid person on any E/R, or to other persons entitled to payments on the same E/R on which the overpayment was made, these benefits may be withheld and the overpayment may thus be *adjusted* (§§ 5513–5520.2).

(*2*) *refund*

If adjustment is not available, the money may be recovered by obtaining a *refund* from the overpaid person. (§§ 5525–5530.5).

(*3*) *civil suit*

Under certain conditions, cases may be referred to GAO for recovery from the overpaid person. (§§ 5531–5535).

(*b*) *Waiver*

Under certain conditions, it is possible to grant relief from repayment. In such cases, we talk in terms of *waiving* recovery, or adjustment of the overpayment. (For purposes of waiver, overpayments are classified as either entitlement or deduction overpayments). Detailed procedures on *waiver* of recovery or adjustment are stated in §§ 5540–5586.

(*c*) *Fraud Involved*

Where a violation of one of the criminal provisions of the act in connection with a claim is suspected and an overpayment exists, all appropriate postadjudicative and recovery actions must be taken to the U.S. Attorney or OPO, BRSI, Program Compliance Branch in accordance with §§ 7543 ff. Thus, action to recover an overpayment will be taken as described above and in the succeeding sections notwithstanding fraud involvement.

SUMMARY OF PROCEDURES FOR DEALING WITH OVERPAYMENTS

5503. Written Notice

When it is determined that an overpayment has been made, the person liable for repayment should be notified in writing (see § 5508.5 for sample letters). The notice will inform the person of:

(a) The incorrect payment made and how and when it occurred (i.e., the overpaid amount, the monthy amount, if any, which should have been paid, why the lesser amount was due the months for which the lesser amount should have been paid, and the amount which was paid for those months). If the overpayment resulted from the entitlement of another beneficiary, the adversely affected individual(s) must be informed of the name, relationship to the WE, and basis for entitlement of the new beneficiary. (see § 4571 (a)).

(b) The right to request reconsideration of the overpayment determination.

(c) The required recovery.

(d) The proposed adjustment or the demand for overpayment determination.

(e) The waiver provisions of the law (Social Security Act, secs. 204(b) or 1870(c)).

(f) The availability of partial adjustment or partial refund.

(g) The need to notify the DO promptly if the

person feels that the circumstances in the case would justify reconsideraiton, waiver, partial adjustment, or partial refund.

It may be necessary to modify the overpayment notice in certain instances. For example, where an overpayment for a prior year cannot be fully recovered by adjustment until some month past the current year, include a request for refund of the entire overpayment when notifying the person of the overpayment and of the proposed adjustments. Advise the person that, if refund is received, payment of benefits can by resumed for an earlier month. Also, when recovery from a person outside the U.S. is involved, see § 5529.

5503.1 Delay in Withholding Benefits to Recover Overpayments

Before adjusting an overpayment against current benefits due a beneficiary, he (and, if applicable, his payee) will normally be given reasonable opportunity to contest the correctness of the determination or to establish that a basis exists for waiver or partial adjustment. The notice will specify the month and year the adjustment is scheduled to begin; the date of the proposed adjustment must be at least 30 days later than the date of the overpayment notice. Actual adjustment may, at the discretion of the reviewing office, be deferred for a longer period when the facts in a given case, including but not limited to time case is being worked, cutoff dates, mailing time, etc., indicate that a 30-day period would be inadequate for consideration of the matter and reply by the beneficiary.

The only exception to this rule is when the overpayment results from the superendorsement procedures under Section 205(n) of the Act whereby payment of a combined check is made to the survivor. Under such circumstances the surviving beneficiary is given notice at the time of superendorsement of the adjustment action that will be taken to recoup the amount of the check which exceeds the amount to which the surviving individual is entitled in his own right.

In the above situation, an immediate adjustment action is taken.

5503.2 Person Liable Protests

(*a*) *General*

The action to be taken when a person from whom recovery is sought responds to an initial notice of overpayment depends on how and when the person responds, the reason for the response, and the method of recovery involved.

In response to an inital overpayment notice, the person may telephone, visit, or write to a DO or RSDI Reviewing office. Generally, the person contacts the DO where appropriate action is taken. In some cases, the reviewing office is contacted directly and a request for DO assistance usually needed to resolve the matter with the person.

The person may question the fact that he has been overpaid, the amount of the overpayment, or both. He may agree with the overpayment determination but dispute the need for recovery, or, although questioning neither the overpayment determination nor repayment of the overpaid amount, he may question

the means or rate of recovery or wish to make full refund instead of having his benefit adjusted. Or, because he does not fully understand the overpayment notice, he may not be in a position to exercise his rights relating to the overpayment and its recovery.

When feasible, the response to an overpayment notice should be handled by means of personal contact. Personal contact gives the employee an opportunity to make inquiry on pertinent issues, give explanation as appropriate, and observe the reactions of the overpaid person for evaluation purposes.

The extent of the development and the amount of corroborating evidence needed will be governed by what is reasonably necessary considering the relative importance of the recommended action and whether questions arise from conflicting statements and all the circumstances in the case. For example, less corroborating evidence would be acceptable in establishing the financial condition of the person overpaid where partial adjustment is the issue, rather than waiver of recovery of an overpayment. For waiver determinations, corroborating evidence may be required to validate a claim by the person overpaid that withholding his monthly benefit would cause hardship. In appropriate situations, obtain corroborating evidence to establish whether the person overpaid is without fault in causing the overpayments and whether recovery would be against equity and good conscience. Only in those cases however, where a request for reconsideration of the overpayment determination or for waiver or partial adjustment is made, or the response indicates that such relief may apply, should development along these lines be undertaken.

(b) DO Action

The action necessary by the DO in handling a response to an overpayment notice usually includes one or more of the following:

(1) Explanation of the overpayment, including use of the SSA–2339 (Request for Postentitlement Information) when the available information (including that available by a query of the ROAR record) does not permit a satisfactory response (§§ 9705 ff.).

(2) Completion of an SSA–561 (Request for Reconsideration) and submission of any additional evidence pertinent to appeal when the person disagrees with an overpayment determination (§§ 5503.4 and 7102–7135).

(3) Waiver development, including completion of an SSA–632 (Overpayment Recovery Questionnaire) or equivalent information, as well as resolution, if necessary, of the liability issue when the person protects recovery of overpayment or is appealing the overpayment determination (§§ 5503.5, 5510–5512 and 5540–5572).

(4) Completion of an SSA–1395 (Receipt and Transmittal Form) when refund is made and, if the person wants to repay in installments and adjustment is not available, completion of an SSA–633 (Agreement to Refund Overpayment) (§§ 5525–5525.9 and 9750 ff.).

(5) Establishment of a person's financial situation, usually involving completion of Part IV of an SSA–632, in connection with a request for partial adjustment (§§ 5503.55, 5515–5515.8).

(6) Completion of SSA–2521 (Request for Priority Action--Overpayment) when any of the preced-

ing apply *and* (A) recovery of the overpayment by adjustment has been proposed or is taking place and (B) there is no ROAR control of the overpayment (§§ 5503.6 and 5503.62).

(7) Completion of SSA–3079 (ROAR Input Data) when there is a ROAR record *and* (A) refund is the method of recovery and either (1), (2), or (3) apply *or* (B) adjustment has been proposed and any of the preceding apply (§ 5525.6).

Procedural due process requires that there be no recovery pending opportunity for the person to appeal the overpayment determination or show that the conditions for waiver are met. It is particularly important that benefits otherwise due not be interrupted to adjust an overpayment until the person has been afforded time to exercise his rights concerning the overpayment.

DO completion of the SSA–2521 and SSA–3079 insures that benefits are not withheld to recover an overpayment or that followup refund requests are not made until the person's reponse to an initial notice of overpayment has been resolved in accordance with the following sections.

5503.3 Request for Explanation of Overpayment

(*a*) *General*

Despite the explanation of the overpayment (i.e., how and when it occurred) and appeal and waiver rights in the initial notice of overpayment, the person may not understand why he was overpaid or how we arrived at the amount of overpayment, or the person may need additional information to decide on any further course of action (e.g., whether or how best

to appeal the overpayment determination or request that recovery be waived). Until this explanation is provided and the person has an opportunity to exercise his rights in connection with the overpayment, there should be no further recovery efforts.

(*b*) *DO Procedures*

When the information available in the DO (including that available by a query of the ROAR record) does not permit a satisfactory explanation of the overpayment, use an SSA–2339 to request additional information from the reviewing office (§§ 9705 ff.). Prepare and input SSA–3079 data (i.e., using Type of Action code "E"—§ 5525.6) if there is a ROAR record of the overpayment (§ 5525.5). Annotate the SSA–2339 "ROAR Input (Date)". If adjustment has been proposed or is taking place *and* no ROAR record exists, attach an SSA–2521 (§ 5503.62) as the transmittal document for the SSA–2339.

After providing the additional explanation of the overpayment, ascertain if the person wishes to request reconsideration or waiver.

1. Person Does Not Request Reconsideration or Waiver—If the person decides not to appeal the overpayment determination or request waiver, obtain a statement to this effect from the person whenever an SSA–2521 or SSA–3079 was prepared in connection with an SSA–2339 request or when the reviewing office in accordance with (c) below asked for DO assistance in providing the explanation. Forward the statement including any refund (other than a benefit check), SSA–1395, SSA–633, or request for partial adjustment to the reviewing office. If there is a ROAR record of the overpayment and partial adjust-

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ment is requested, proceed as in § 5503.55, including update of ROAR (using Type of Action code "B"—§ 5525.6) before forwarding the partial adjustment request to the reviewing office.

2. Person Requests Reconsideration or Waiver—If the person wishes to appeal or requests that recovery be waived, proceed as in §§ 5503.4 or 5503.5, including update of ROAR (using Type of Action code "R," "W," or "C"—§ 5525.6).

(*c*) *Reviewing Office Procedure*

When the reviewing office receives a direct request for additional information or is unable to determine what action the person is requesting, forward the request with an explanation of the overpayment and a payment worksheet to the DO and ask that the DO contact the person. If a ROAR record of the overpayment exists, input the request for explanation to ROAR to prevent further recovery efforts (e.g., adjustment of benefits, reminder notice, etc.), and advise the DO of the action taken. If no ROAR record exists and adjustment has been proposed or is taking place, stop the adjustment, and advise the DO of the action taken.

5503.4 Request for Reconsideration of Overpayment

(*a*) *DO Procedures*

When a person requests reconsideration of an overpayment determination, have him complete form SSA–561 and submit any additional information pertinent to the appeal (§§ 7102–7135). Be certain, however, that the person wants to appeal the substantive determination (i.e., fact and/or amount) of overpayment before obtaining a completed SSA–561. Do not have the person complete an SSA–561 if he is seeking only an explanation of the overpayment or is interested in requesting only waiver of recovery.

Note that a reconsideration request must be in writing.

When an SSA–561 is completed, insure that the specific reasons for requesting reconsideration of the overpayment determination are shown. In some cases, it will be necessary to obtain copies of negotiated checks (§§ 5705, 5819.5(b), 5822), for purposes of reconsidering an overpayment determination. Do not request the folder from the reviewing office in connection with a reconsideration request unless the person appealing asks that it be available for his review.

In addition, undertake full waiver development, including the completion of form SSA–632, and submission of any other information pertinent to a waiver determination (§§ 5540 ff.) unless (1) it is obvious that reconsideration will result in a determination that there is no overpayment or (2) the person does not want to pursue waiver. Explain to the person that, even if reconsideration affirms the overpayment determination, relief from repayment can be granted if the conditions for waiver are met and his failure to furnish the waiver information will generally result in a denial of waiver being included in the reconsideration notice. If the person refuses to provide the waiver information, secure a statement from him to this effect on the SSA–561 or on an SSA–795 or document this fact on an RC.

Immediately prepare and input an SSA–3079 using Type of Action code "R" (or "C", if both reconsidera-

tion and waiver are requested), if there is a ROAR record of the overpayment (§§ 5525.5–5525.6). Annotate the SSA–561 (or top-most document) "ROAR Input (Date)". If no ROAR record exists, immediately notify the reviewing office by using form SSA–2521 (§ 5503.62) to stop a proposed adjustment action because of the request for reconsideration unless the reviewing office has already been notified of the need for such action (e.g., in accordance with § 5503.3). However, do not delay the SSA–3079 or SSA–2521 merely because the reconsideration and waiver development require additional time.

Handle any request for withdrawal of the reconsideration request in accordance with § 7126.7. If the person in such case wishes to pursue waiver, follow the instructions in § 5503.5.

(b) Reviewing Office Procedures

Acknowledge in writing a timely reconsideration request when the person makes direct contact with the reviewing office, and take action to stop any further recovery actions, including the reinstatement of benefits (§ 5503.6(b)). The reviewing office also takes action to stop recovery action when notified of a timely reconsideration request by form SSA–2521 unless the DO has timely input SSA–3079 data in accordance with (a) above. Follow the instructions in §§ 7102 ff. and 8700 ff, for reconsidering the determination.

NOTE: If a person in appealing an overpayment determination contests the amount of overpayment, it may be necessary to secure copies of negotiated social security checks (§§ 5705, 5819.5(b), 5822) for purposes of the reconsideration determination. For example a

person alleges not having been paid for 2 months in which the overpayment notice stated that he had received monthly checks of $324 each.

Where an SSA–561 is received and it is clear that the person is not contesting the overpayment but is instead requesting relief from repayment (e.g. the only reason on the SSA–561 for requesting reconsideration is "The overpayment was not my fault, and I do not believe I should have to pay back the overpayment," and form SSA–632 is the only attachment), do not reconsider the overpayment determination. In the notice of the waiver determination, include the following:

> "Although you requested reconsideration of the overpayment determination, the reason you gave indicates that you are not questioning the fact or amount of overpayment but only the need for recovery. Although we have considered your reasons for asking that we waive recovery, we have not formally reviewed the overpayment determination. If we were wrong in not reconsidering the overpayment determination, please contact any social security office within 30 days of the date of this notice."

When the reconsideration determination has been made, make certain that the ROAR record is updated (§ 5525.6).

5503.5 DO Handling of Request for Waiver of Recovery

If the person requests waiver of recovery whether or not appealing the overpayment determination, have him complete an SSA–632 (§§ 5545–5545.5).

If a ROAR record exists (§§ 5525.5), prepare and input an SSA–3079 using Type of Action code "W"

(or "C", if both reconsideration and waiver are requested). The ROAR record will be updated by the reviewing office when the waiver determination is made.

If adjustment has been proposed or is in effect *and* no ROAR record exists, complete an SSA–2521, and send it to the reviewing office.

5503.55 DO Handling of Request or Different Rate of Repayment

A person who disagrees with neither the overpayment determination nor the need for recovery may request a different rate of repayment. Where full withholding has been proposed or is in effect, the person may request that only a part of his benefit be withheld each month until the overpayment has been fully adjusted (§§ 5515–5515.8), and, where refund is the method of recovery, the person may request refund in installments rather than immediate refund in a single payment (§§ 5525.4–5525.45).

Where a requested rate of repayment would permit full recovery within a 36 month period and is no less than $10 a month, there is no need to develop. If overpayment recovery would not be completed within 36 months, obtain financial information by having the person complete Parts III and IV of the SSA–632. If the rate of repayment based on the person's financial situation would be less than $10, develop waiver by having the person complete the SSA–632. For a discussion of partial adjustment, see §§ 5515–5516; see §§ 5525.4–5525.45 for a discusion of installment refund and use af the SSA–633.

If a person does not take issue with the overpayment determination or the need for recovery, do not

have the person complete an SSA–561 and do not develop for waiver unless the suggested rate of repayment would be less than $10. When a person against whom adjustment has been proposed or whose benefit is being withheld to recover an overpayment requests a lesser rate of adjustment, prepare and input an SSA–3079 (i.e., using Type of Action code "B") if there is a ROAR record of the overpayment (§§ 5525.53, 5525.54). Annotate the request (e.g., SSA–795) "ROAR Input (Date)." If adjustment has been proposed and no ROAR record exists, notify the reviewing office by using form SSA–2521 (§ 5503.6); if any necessary development will not be delayed, use the SSA–2521 to transmit the request.

5503.6 Use of SSA–2521

(a) DO Procedures

When a ROAR record of the overpayment does not exist *and* adjustment is the method of recovery, use the SSA–2521 (§ 5503.62) to notify the reviewing office of the following:

(1) Request for explanation of overpayment (§ 5503.3),

(2) Request for reconsideration of the overpayment determination (§ 5503.4),

(3) Request for waiver of recovery (§ 5503.5),

(4) Request for partial adjustment (§ 5503.55),

(5) Refund of an overpayment, and

(6) Request for reconsideration of a denial of waiver (§§ T5507, T5511)

When there is a ROAR record of the overpayment or adjustment is not the method of recovery, do not use the SSA–2521. Also, once payment continuation is assured do not use the SSA–2521.

To make proper use of the SSA–2521, the DO should be aware of the individual's payment status. Generally, the payment status will be clear from the information provided by the person and from the overpayment notice. The "Current" payment block (i.e., adjustment has been scheduled) or "Deferred" payment block (i.e., overpayment adjustment action has been taken) on the SSA–2521 should usually be checked. The "Unknown" block should seldom be checked.

If a request for overpayment reconsideration or waiver of recovery is received from an individual in suspension or deduction status and additional information is received showing that the benefits are otherwise payable, use an RC to alert the reviewing office of the request for reconsideration or waiver at the same time you input the posteligibility data to reinstate.

If reconsideration or waiver of recovery is requested and the SSA–2521 is being used, forms SSA–561 and/or SSA–632, or their equivalent, should be completed and sent to the reviewing office. If possible, full reconsideration and/or waiver development should accompany the SSA–2521. However, if unable to send the completed form(s) and development, check "Pending," and estimate when the necessary development will be sent.

Similarly, if partial adjustment is requested and the SSA–2521 is being used, the request and any information as required by §§ 5515 ff. should accompany the SSA–2521 to the reviewing office unless the development needed will be delayed (§ 5503.55). Explain to the person that the reviewing office will advise him when there has been a decision concerning his request for partial adjustment.

(b) Reviewing Office Procedures

If within 30 days of receiving the initial notice, the person requests reconsideration of the overpayment determination or waiver of recovery, or good cause is established for not making such request within 30 days, take action to stop the scheduled adjustment action and to restore all benefits withheld to recover the overpayment (§ T5505).

If the waiver request is made after 30 days, or if the reconsideration request is made after 30 days but prior to the expiration of reconsideration rights (i.e., within 60 days), and good cause for late filing cannot be established, any adjustment action in progress will be suspended and benefits reinstated effective with the date of the reconsideration or waiver request (§§ T5502(c) and T5505.7).

If good cause for late filing is established, any request is treated as though timely filed. If good cause is being developed, immediately reinstate effective with the date of request. After development, reissue back payments if good cause is established (§ T5505.7).

5513. Adjustment of Overpayments

Recoupment of an overpayment of title II benefits by adjustment is accomplished under sec. 204(a) of the Act by withholding benefits otherwise due the overpaid person on any E/R, or from other persons entitled to payments on the same E/R on which the overpayment was made (§ 5510(c)). See § 5513.2 for the order of priority of adjustment.

Where a representative payee is solely or jointly liable for repayment of an overpayment to a beneficiary (§ 5511) and fails to make refund, adjustment may be made against any benefits payable to the representative payee in his own right.

For the priority of adjusting overpayments when deduction and other withholding provisions are involved, see § 5430.

* * * * *

5513.3 Proposed Rate of Adjustment

When adjustment is the method of recovery, a withholding of the full monthly benefit (after any SMI premium deduction) will be proposed.

If, in response to a proposed withholding of the full monthly benefit, the beneficiary indicates that the amount to be withheld will cause financial hardship or otherwise protests recovery (§§ 5503.3 ff.), the rate of adjustment to recover an overpayment

not subject to waiver may be varied when the facts and circumstances in a given case dictate a different course (§§ 5515 ff.).

* * * * *

PARTIAL ADJUSTMENT

5515. Reasons for Partial Adjustment

When a beneficiary currently eligible for payment of title II benefits is liable for repayment of an overpayment, the initial notice of overpayment (§ 5503) will propose recovery of the overpayment by a withholding of the full amount of the benefit payable. Full withholding is generally not required, however, if a written or oral request for waiver or partial adjustment is received.

Partial adjustment to recover an overpayment serves three basic purposes:

(*a*) If the beneficiary is dependent upon some of his monthly benefits for ordinary and necessary living expenses, withholding only part of his benefit each month eases his financial situation to some extent by permitting the beneficiary to rely upon a part of the benefit for his current basic needs during the recovery period.

(*b*) If waiver depends upon whether adjustment would defeat the purpose of title II (§§ 5550–5551), withholding only part of a monthly benefit frequently enables us to effect full recovery of the overpayment without depriving the beneficiary of funds needed for ordinary and necessary living expenses.

* * * * *

Sections 5515.2–5516 explain the policies and procedures to be applied in granting partial adjustment

when relief from repayment is requested or premium collection is involved.

5515.2 When To Grant Partial Adjustment

(a) *Partial Adjustment Permitted*

Grant a request for partial adjustment, unless (1) the beneficiary has income and resources sufficient to meet current ordinary expenses despite a loss of the full monthly benefits or (2) there is evidence of fraud.

When an overpaid beneficiary does not take issue with the overpayment determination or the proposed adjustment and clearly requests only that adjustment be effected by withholding part of his monthly benefit do not have the beneficiary complete an SSA–561 or develop for waiver unless a withholding of less than $10 a month would result. Conversely, treat a request for waiver of recovery of an overpayment as a request for partial adjustment if waiver must be denied. Note that, if waiver depends upon a finding of defeat the purpose of title II and the beneficiary does not have the incorrect funds in his possession (§ 5546) and needs only part of his monthly benefit for ordinary and necessary living expenses (§§ 5550–5551), waiver should be denied and partial adjustment granted. However, if it would be necessary to withhold less than $10 a month to preclude a finding of defeat the purpose, approve waiver rather than great partial adjustment if the person is without fault. Of course, if the person is at fault in causing the overpayment, waiver cannot be approved and partial adjustment should be granted in accordance with § 5515.4(c).

(b) *Partial Adjustment Not Permitted*

Regardless of a beneficiary's alleged financial circumstances, never permit partial adjustment to recoup an overpayment which was the result of fraud (i.e., an intentional false statement or representation by the person against whose benefits adjustment is being made, or by his willful concealment of or deliberate failure to furnish material information). In such situation, full withholding of the benefit to adjust the overpayment is required. Also, see § 5502(c).

5515.4 Establishing Rate of Partial Adjustment

(a) *General*

If the beneficiary requests partial adjustment or a request for waiver must be denied, the rate of adjustment established will depend on the facts in the particular case. If partial adjustment only is requested, the beneficiary's financial situation generally will not be developed. Whether or not financial information is obtained, a person will not be considered at fault for purposes of partial adjustment unless a finding as to fault has been made in connection with a request for waiver. Where a withholding of less than $10 a month would be warranted by the beneficiary's financial circumstances, a finding as to fault must be made (§ 5515.2(a)).

(b) *When to Develop Financial Circumstances*

Where financial information has not been obtained in connection with waiver development, presume that withholding the full amount of the monthly benefit

will cause financial hardship unless (1) there is information to the contrary or (2) full recovery of the overpayment could not be completed by the suggested rate of adjustment within a 36 month period.

When the available financial information appears to warrant a rate of adjustment greater than the suggested rate of adjustment or the partial adjustment would not permit the overpayment to be recovered within 36 months, secure detailed financial information by having the beneficiary complete Parts III and IV of the SSA–632, and establish the rate of adjustment in accordance with (c) below.

(*c*) *Financial Circumstances Not Developed*

Where financial information was not developed in connection with a request for waiver and was not required by (b) above, grant partial adjustment at the rate suggested by the beneficiary. If the beneficiary does not suggest a monthly withholding amount, withhold one-fourth of the monthly benefit (prior to any premium deductions—see § 5516) to recover the overpayment. In figuring 25 percent of a person's benefit, round to the nearest whole dollar amount.

* * * * *

(*d*) *Financial Circumstances Developed*

When a beneficiary's financial circumstances are known (e.g., beneficiary completed Parts III and IV of the SSA–632 in connection with a request for partial adjustment or waiver), withhold that amount by which the beneficiary's income exceeds his expenses except as specified below.

(1)Withhold no less than $10 per month; *and*

(2) Withhold the full monthly benefit (after deduction for any SMI premium) to the extent of any incorrect funds in the beneficiary's possession; *and*

(3) Withhold 25 percent of the monthly benefit (before any deduction for SMI premiums) but no less than $10 monthly if the beneficiary was at fault in causing the overpayment and recovery at a rate less than 25 percent of the monthly benefit would not permit full recovery within 36 months (or before termination of entitlement).

Of course, if the beneficiary requests a greater rate of withholding, adjust at the rate suggested by the beneficiary.

If it would be necessary based on a comparison of income and expenses to withhold less than $10 from a person who is without fault, partial adjustment does not apply (§ 5515.2(a)).

If the comparison of income and expenses would indicate a withholding of less than 25 percent of the monthly benefit of a beneficiary who is a fault, establish the amount by which income exceeds expenses as the rate of adjustment provided full recovery will be completed within 36 months or prior to the beneficiary's expected last month of entitlement. However, where a withholding of less than 25 percent of the benefit would not permit full recovery within 36 months or, if earlier, the beneficiary's expected last month of entitlement, grant partial adjustment of 25 percent of the monthly benefit.

II. Pertinent Provisions of the Code of Federal Regulations, Title 20

20 C.F.R. Part 404 provides in pertinent part:

§ 404.502 Overpayments.

Upon determination that an overpayment has been made, adjustments will be made against monthly benefits and lump sums as follows:

(a) *Individual overpaid is living.* (1) If the individual to whom an overpayment was made is at the time of a determination of such overpayment entitled to a monthly benefit or a lump sum under title II of the Act, or at any time thereafter becomes so entitled, no benefit for any month and no lump sum is payable to such individual, except as provided in paragraphs (c) and (d) of this section, until an amount equal to the amount of the overpayment has been withheld or refunded. Such adjustments will be made against any monthly benefit or lump sum under title II of the Act to which such individual is entitled whether payable on the basis of such individual's earnings or the earnings of another individual.

(2) If any other individual is entitled to benefits for any month on the basis of the same earnings as the overpaid individual, except as adjustment is to be effected pursuant to paragraphs (c) and (d) of this section by withholding a part of the monthly benefit of either the overpaid individual or any other individual entitled to benefits on the basis of the same earnings, no benefit for any month will be paid on such earnings to such other individual until an amount equal to the amount of the overpayment has been withheld or refunded.

* * * * *

(c) *Adjustment by withholding part of a monthly benefit.* Adjustment under paragraph (a) and (b) of this section may be effected by withholding a part of the monthly benefit payable to an individual where it is determined that:

(1) Withholding the full amount each month would "defeat the purpose of title II," i.e., deprive the person of income required for ordinary and necessary living expenses (see § 404.-508); and

(2) Recoupment can be effected in an amount of not less than $10 a month and at a rate which would not result in extending the period of adjustment beyond the earlier of the following:

(i) The expected last month of entitlement; or

(ii) Three years after the initiation of the adjustment action (except that in cases where the individual was "without fault" (see §§ 404.507 and 404.510), the period of adjustment may be extended beyond 3 years, if necessary); and

(3) The overpayment was not caused by the individual's intentional false statement or representation, or willful concealment of, or deliberate failure to furnish, material information.

* * * * *

[35 F.R. 5943, Apr. 10, 1970]

§ 404.502a Notice of right to waiver consideration.

Whenever an initial determination is made that more than the correct amount of payment has been made, notice of the provisions of sections 204(b) and 1870(c) of the Act regarding waiver of adjustment or recovery shall be sent to the overpaid individual and to any other individual against whom adjustment or recovery of the overpayment is to be effected (see § 404.506).

[37 F.R. 10554, May 25, 1972]

* * * * *

§ 404.506 When waiver of adjustment or recovery may be applied.

Sections 204(b) and 1870(c) of the Act provide that there shall be no adjustment or recovery in any case where an incorrect payment under title II (old-age, dependent's, survivor's and disability insurance benefits) or under title XVIII (hospital and supple-

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mentary medical insurance benefits) has been made (including a payment under section 1814(e) of the Act) with respect to an individual:

(a) Who is without fault, and

(b) Adjustment or recovery would either:

(1) Defeat the purpose of title II of the Act, or

(2) Be against equity and good conscience.

[32 F.R. 18026, Dec. 16, 1967]

* * * * *

§ 404.508 Defeat the purpose of Title II.

(a) *General.* "Defeat the purpose of title II," for purposes of this subpart, means defeat the purpose of benefits under this title, i.e., to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. An individual's ordinary and necessary expenses include:

(1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g., life, accident, and health insurance including premiums for supplementary medical insurance benefits under title XVIII), taxes, installment payments, etc.;

(2) Medical, hospitalization, and other similar expenses;

(3) Expenses for the support of others for whom the individual is legally responsible; and

(4) Other miscellaneous expenses which may reasonably be considered as part of the individual's standard of living.

(b) *When adjustment or recovery will defeat the purpose of title II.* Adjustment or recovery will defeat the purposes of title II in (but is not limited to) situations where the person from whom recovery is

sought needs substantially all of his current income (including social security monthly benefits) to meet current ordinary and necessary living expenses.

[32 F.R. 18026, Dec. 16, 1967, as amended at 34 F.R. 14888, Sept. 27, 1969]

§ 404.509 Against equity and good conscience; defined.

"Against equity and good conscience" means that adjustment or recovery of an incorrect payment (under title II or title XVIII) will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right (examples (1), (2), and (5)) or changed his position for the worse (examples (3), and (4)). In reaching such a determination, the individual's financial circumstances are irrelevant.

[27 F.R. 1162, Feb. 8, 1962, as amended at 28 F.R. 14492, Dec. 31, 1963; 32 F.R. 18026, Dec. 16, 1967]

* * * * *

§ 404.905 Administrative actions that are initial determinations.

* * * * *

(b) *Modification of the amount of monthly benefits or lump sum.* The Administration shall, under the circumstances hereafter stated in this paragraph, make findings, setting forth the pertinent facts and conclusions, and an initial determination as to whether:

* * * * *

(4) There has been an overpayment or underpayment of monthly benefits or a lump sum and, if so, the amount thereof, and the adjustment under section

204(a) or section 204(d) of the Act, to be made by increasing or decreasing the monthly benefits or lump sum to which an individual is entitled;

* * * * *

§ 404.906 Administrative actions which are not initial determinations.

Administrative actions which shall not be considered initial determinations under any provision of the regulations in this Subpart J, but which may receive administrative review, include, but are not limited to, the following:

* * * * *

(e) The withholding by the Administration in any month, for the purpose of recouping an overpayment, of less than the full amount of the monthly benefit otherwise payable in that month (see § 404.502).

* * * * *

§ 404.907 Notice of initial determination.

Written notice of an initial determination shall be mailed to the party to the determination at his last known address, except that no such notice shall be required in the case of a determination that a party's entitlement to benefits has ended because of such party's death (see § 404.905(d)). If the initial determination disallows, in whole or in part, the application or request of a party, or if the initial determination is to the effect that a husband, widower, or parent was not receiving the requisite support from an insured individual, or that a party's entitlement to benefits has ended, or that a reduction, deduction, or adjustment is to be made in benefits or a lump sum, or that a period of disability established for a party has terminated, the notice of the determination sent to the party shall state the basis for the determination. Such notice shall also inform the party of the right to reconsideration (see § 404.910). Where more than the correct amount of payment has been made, see § 404.502a.

[37 F.R. 10554, May 25, 1972]

§ 404.908 Effect of initial determination.

The initial determination shall be final and binding upon the party or parties to such determination unless it is reconsidered in accordance with §§ 404.910–404.916, or it is revised in accordance with § 404.956.

§ 404.909 Reconsideration and hearing.

Any party who is dissatisfied with an initial determination may request that the Administration reconsider such determination, as provided in § 404.910. If a request for reconsideration is filed, such action shall not constitute a waiver of the right to a hearing subsequent to such reconsideration if the party requesting such reconsideration is dissatisfied with the determination of the Administration made on such reconsideration; and a request for a hearing may thereafter be filed, as is provided in § 404.917.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.910 Reconsideration; right to reconsideration.

The Administration shall reconsider an initial determination if a written request for reconsideration is filed, as provided in § 404.911, by or for the party to the initial determination (see § 404.905). The Administration shall also reconsider an initial determination (unless the determination is with respect to the

revision of the Administration's earnings records) if a written request for reconsideration is filed, as provided in § 404.911, by an individual as a wife, widow, divorced wife, surviving divorced wife, surviving divorced mother, husband, widower, child, parent individual alleging equitable entitlement to a lump sum or representative of a decedent's estate, who makes a showing in writing that his or her rights with respect to monthly benefits, a lump sum, a period of disability, or entitlement to hospital or supplementary medical insurance benefits, may be prejudiced by such determination. The Administration shall also reconsider an initial determination relating to the revision of the Administration's record of the earnings (see § 404.905 (g)) of a deceased individual if a written request for reconsideration is filed, as provided in § 404.911, by a person as a widow, divorced wife, surviving divorced wife, surviving divorced mother, widower, child, parent, an individual alleging equitable entitlement to a lump sum, or representative of the decedent's estate.

[31 F.R. 16766, Dec. 31, 1966]

§ 404.911 Time and place of filing request.

The request for reconsideration shall be made in writing and filed at an office of the Social Security Administration or, in the case of an individual in the Philippines, at the Veterans' Administration or, in Philippines, at the Veterans' Administration Regional Office in the Philippines, or, in the case of an individual having 10 or more years of service in the railroad industry (see Subpart 0) or of an individual entitled to an annuity on the basis of an award under the Railroad Retirement Act prior to October 30, 1951, who requests in writing reconsideration with respect to his application to establish a period of disability under section 216(i) of the Act, at an office of the Railroad Retirement Board, within 60 days after the date of receipt of notice of the initial determination, unless such time is extended as provided in § 404.612 or § 404.953. For purposes of this section, the date of receipt of notice of the initial determination shall be presumed to be 5 days after the date of such notice, unless there is a reasonable showing to the contrary.

[41 FR 47917, Nov. 1, 1976]

§ 404.912 Parties to the reconsideration.

The parties to the reconsideration shall be the person who was the party to the initial determination (see § 404.905), and any other person referred to in § 404.910 upon whose request the initial determination is reconsidered.

§ 404.913 Notice of reconsideration.

If the request for reconsideration is filed by a person other than the party to the initial determination, the Administration shall, before such reconsideration, mail a written notice to such party at his last known address, informing him that the initial determination is being reconsidered. In addition, the Administration shall give such party a reasonable opportunity to present such evidence and contentions as to fact or law as he may desire relative to the determination.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.914 Reconsidered determination.

The Administration shall, when a request for reconsideration has been filed, as provided in §§ 404.910 and 404.911, reconsider the initial determination in

question and the findings upon which it was based; and upon the basis of the evidence considered in connection with the initial determination and whatever other evidence is submitted by the parties or is otherwise obtained, the Administration shall make a reconsidered determination affirming or revising, in whole or in part, the findings and determination in question.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.915 Notice of reconsidered determination.

Written notice of the reconsidered determination shall be mailed to the parties at their last known addresses. The reconsidered determination shall state the specific reasons therefor and inform the parties of their right to a hearing (see § 404.917), or, if appropriate, the requirements for use of the expedited appeals process (see § 404.916a).

[40 F.R. 53386, Nov. 18, 1975]

§ 404.916 Effect of a reconsidered determination.

The reconsidered determination shall be final and binding upon all parties to the reconsideration unless a hearing is requested in accordance with § 404.918 and a decision rendered or unless such determination is revised in accordance with § 404.956, or unless the expedited appeals process is used, in accordance with § 404.916a.

[40 F.R. 53386, Nov. 18, 1975]

* * * * *

§ 404.917 Hearing; right to hearing.

An individual has a right to a hearing about any matter designated in § 404.905 if:

(a) An initial determination and a reconsideration of the initial determination have been made by the Social Security Administration; and

(b) The individual is a party referred to in § 404.919 or § 404.920; and

(c) The individual has filed a written request for a hearing under the provisions described in § 404.918.

[31 F.R. 1676, Dec. 31, 1966]

* * * * *

III. Pertinent Statutory Provision

42 U.S.C. 404:

OVERPAYMENTS AND UNDERPAYMENTS

(a) Whenever the Secretary finds that more or less that the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:

(1) With respect to payment to a person more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such overpaid person, or shall apply any combination of the foregoing. A payment made under this subchapter on the basis of an erroneous report of death by the Department of Defense of an individual in the line of duty while he is a member of the uniformed services (as defined in section 410(m) of this title) on active duty (as defined in section 410(*l*) of this title) shall not be considered an incorrect payment for any month prior to the month such Department notifies the Secretary that such individual is alive.

(2) With respect to payment to a person of less than the correct amount, the Secretary shall make payment of the balance of the amount due such underpaid person, or, if such person dies before payments are completed or before negotiating one or more checks representing correct payments, disposition of the amount due shall be made in accordance with subsection (d) of this section.

(b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

* * * * *

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Supreme Court, U. S.
FILED
DEC 4 1978

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1511

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Petitioner

—*v.*—

EVELYN ELLIOTT, ET AL.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Petitioner

—*v.*—

FANNIE BUFFINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED APRIL 21, 1978
CERTIORARI GRANTED OCTOBER 2, 1978

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1511

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Petitioner

—*v.*—

EVELYN ELLIOTT, ET AL.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Petitioner

—*v.*—

FANNIE BUFFINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1974	
Apr 8	FILED CERT TRANSC OF RECORD ON APPEAL IN SIX VOLUMES: VOL I thru III, PLEADINGS ORIG ONLY; VOLS IV thru VI, REPORTER'S TRANSC ORG & 1 COPY; *FILED ORIG EXHIBITS IN LPS*
Apr 8	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL USA
Apr 11	Appellant's Brief Due May 21, 1974 -ra-
Apr 15	Filed applts' motion for stay pending appeal (panel 4/29/74). ty
Apr 22	FILED TWO ADD'L COPIES OF THE RECORD, VOLS. I, II, & III. no fee th
Apr 22	Filed aples' memorandum opposition to aplts' motion for stay pending appeal. (to O'Fallon) cs
May 1	Filed aplts' supplemental memorandum in support of motion for stay. (to O'Fallon) cs
May 6	Filed order (E & G) denying applts motion for stay. rh
May 20	Filed applt's motion for ext of time to file brief (C). ty
May 24	Filed order (C) granting aplt an ext of 21 days to and including June 11, 1974 to file brief. jr
June 13	Filed aplt's motion for leave to file typewritten brief to (C) with copy of typewritten brief. jr
June 18	Filed order (C) granting aplts leave to file typewritten brief. jr
June 18	Filed appellants typewritten copy of brief. gb
June 20	FILED 25 APPELLANTS BRIEFS (6/11/74) jr

DATE	FILINGS—PROCEEDINGS

1974

July 11 Filed aples' motion for an ext of time to file brief to (C). jr

July 16 Filed order (C) aples' brief due August 12, 1974. jr

July 24 Filed the Committee for the Rights of the Disabled ("CRD") motion for leave to file brief as amicus curiae on behalf of aples, to (McAvoy). jr

July 24 Filed aples' (Angel Hurtado & Helen Pritt, etc.) motion to intervene to (McAvoy). jr With brief of intervenor applicants.

July 25 Recvd intervenor's (Angel R. Hurtado) affidavit, returned for certificate of service. jr

Aug 6 Filed Intervenor's Affidavit. (McAvoy)

Aug 13 FILED 25 APPELLEES BRIEFS (Aug 9 1974) tj

Aug 16 Filed order (K & Cy) denying motion of (A. Hurtado & H. Pritt) for leave to intervene; further ordered, Committee for the Rights of the Disabled is granted leave to file a brief as amicus curiae; and the brief shall be filed within 7 days of the date this order is entered. jr

Aug 23 Filed Orig & 24 briefs of Amicus Curiae (Committee for the rights of the disabled) on behalf of aples. (Aug. 23, 1974) tj

Aug 26 Filed aplt's motion for an ext of time to file closing brief to (C). jr

Aug 28 Filed order (C) granting aplt an ext of time to and including September 9, 1974 to file closing brief. jr

Sept 11 Filed aplts' motion for leave to file reply brief in typewritten form pending reproduction to (M). jr

Sep 17 Filed Order (M) granting aplts leave to file typewritten copy of brief pending reproduction. cs

DATE	FILINGS—PROCEEDINGS

1974

Sept 18 Filed 25 copies Aplt's reply briefs. (Sept. 9, 1974) tj

Nov 8 Filed aplt's motion for leave to consolidate #74-1611 with an undocketed appeal *Buffington & Biner* vs. *Weinberger* to (C). jr

Nov 26 Filed Order (Goodwin & Sneed) granting leave to consolidate appeal with 74-3118 for purposes of consideration & oral argument; further Ordered aplts' brief in 74-3118 shall be filed on or before December 16, 1974; Aples' brief shall be filed on or before January 6, 1975 & Aplts' reply brief shall be filed on or before January 16, 1975. The Clerk shall calendar the cases for oral argument in San Francisco during the week of February 14, 1975. Aples' application for stay pending appeal in 74-3118 is hereby denied. cs

Dec 5 Filed, in 74-3118, order (Sneed) amending in the last paragraph court's order entered 11/26/74: upon due consideration, aplt's application for a stay pending appeal in 74-3118 is hereby denied. jr

Dec 6 Rec'd, in 74-3118 aple counsel's letter eliminating Robert J. LeClair as attorney of record. jr

Dec 13 Filed, in 74-3118, aplt's motion for leave to file brief in typewritten form and to supplement record references to (C) with copy of brief. jr

Dec 24 Filed, in 74-3118, order (C) granting aplt leave to file brief in typewritten form and to supplement record references. jr CALENDARD 2-10-75 S.F.

1975

Jan 7 Filed in 74-3118, ORIG & 24 APPELLEE'S BRIEF (1-6-75) (to panel) sj

Jan 8 RECEIVED IN (74-3118), ORIG & 24 APPELLANT'S BRIEF (12-12-75) sj

DATE	FILINGS—PROCEEDINGS

1975

Jan 13 Filed, in 74-3118, motion & order (Br) directing clerk to file the brief. jr

Jan 13 FILED IN 74-3118 25 APPELLANTS BRIEF (12/12/74). Panel. cl

Jan 20 Filed in 74-3118 aplt's motion for leave to file reply brief in typewritten form. To panel w/ copy of brief. cl

Jan 22 Received aple's letter requesting thirty minutes additional time for argument. To panel. cl

Jan 23 Filed, in 74-3118, order (Br) granting aplt leave to file reply brief in typewritten form. jr

Jan 23 Rec'd additional citations for apels in 74-3118 to (panel). jr

Jan 23 FILED 4 APPELLANTS REPLY BRIEFS (1/16/75). cl (TYPEWRITTEN)

Jan 29 FILED 25 APPELLANTS REPLY BRIEFS (1/16/75). To panel. cl

Feb 3 Rec'd aples' (Elliott, et al) additional citations to (panel). jr

Feb 3 Rec'd aples' (Buffington, et al) additional citations to (panel). jr

Feb 4 Pursuant to instructions from the court; Clerk's letter advising counsel request for add'l time for oral argument has been denied. gb

Feb 10 Argued & submitted to Br. T, CJJ; & S. Williams, DJ.

Feb 10 Filed in 74-3118 aple's additional authority. To panel. cl

Feb 25 Recvd government counsel's letter re add'l information requested during court session. (to Panel) cs

DATE	FILINGS—PROCEEDINGS

1975

Apr 24 Rec'd in 74-3118, aplt's letter of additional citations to (panel). jr

June 13 Recd in 74-3118, aple's letter of June 11, 1975 re recent decisions by CA, 3rd Cir. (panel) ec

Jun 30 Rec'd in 74-3118, aplt's letter of additional citations to (panel). jr

Sept 18 Rec'd aplt's letter of Sept 16 re decision by CA, 7th Cir. in Fisher, etc v. Secy of HEW, et al. (panel) ec

Sept 26 Rec'd, in 74-3118, aplts' letter of additional citations to (panel). jr

Oct 1 ORDERED OPINION (S. WILLIAMS) FILED & JUDG TO BE FILED & ENTD

Oct 1 Filed opinion—Affirmed in part, reversed in part, and the cases are remanded.

Oct 1 Filed & Entered Judgment. jr

Oct 13 Pursuant to instructions from Judge Browning, mandate not to be issued until further order of the court. jc

Oct 30 Filed appellees' motion & affidavit for ext of time to file Petition for Rehearing and for suggestion for rehearing en banc. panel

Oct 30 Rec'd an orig. & 24 Petition for Rehearing and Suggestion of the appropriateness of rehearing en banc. (panel) ec

Nov 10 Filed Order (Br) to file petition for rehearing. (all active judges)

Nov 20 Filed order (Melfi for the Court) defendants-Appellants are requested to file a response to the petition for rehearing. jr

Dec 18 Filed appellants' opposition to appellees' Petition for Rehearing and Suggestion of the Appropriateness of a Rehearing En Banc. (all active judges) ec

DATE	FILINGS—PROCEEDINGS

1976

March 4 Received Supreme Court notice that petition for certiorari was filed on February 27, 1976, assigned number 75-1234. wdt

Mar 15 Filed Appellees' motion for an order requiring the parties to submit supplemental briefs. (panel) ec

Mar 22 Rec'd from appellees letter dated March 15, 1976, re typo errors in motion for an order requiring parties to submit supp. briefs. (panel) ec

Mar 22 Filed Appellant's opposition to appellees' motion for order requiring the parties to submit supp. briefs, etc. (panel) ec

Mar 30 Filed order (S. Williams) directing the parties to submit add'l briefs on the impact, if any, of the recent Supreme Court decision in *Eldridge* v. *Weinberger*, rr U.S.L.W., 4224 (February 24, 1976). Aplts' brief shall be filed within 30 days of the date of this order & the brief for aples shall be filed within 30 days of their receipt of aplts' brief. (Aplts brief due 4/29/76) jc

Apr 22 Filed Appellants' motion for ext of time to file supplemental brief. (panel) ec

May 3 Filed order (S. Williams) granting aplts an ext of time to file supplemental brief to and including May 24, 1976. -dmf-

May 26 Filed Appellants' motion for ext of time to file supp. brief. (panel) ec

June 1 Rec'd from Stanley E. Levin, Esq., letter dated May 27, 1976 re: aplts' motion for ext of time for filing supp. brief. (panel) ec

June 29 Filed order of Judge Spencer Williams granting appellants' motion for a thirty-day extension to June 23, 1976 to file their supplemental brief. wdt

DATE	FILINGS—PROCEEDINGS

1976

June 25 Filed aplts' motion for a 7-day ext of time in which to file supp. brief. to Judge S. Williams. ec

July 1 Filed aplts' motion for a 28-day ext of time in which to file supp. brief. to Judge Williams, S. ec

Jul 2 Filed order (S. Williams) granting aplts a 7-day ext of time to file supplemental brief, to and including June 30, 1976. -dmf-

July 6 Filed, as of June 24, 1976, copy of Supreme court order granting certiorari. To panel. wdt

July 6 CASE RE-OPENED JS 34 prepared

July 6 Filed, as of June 24, 1976, certified copy of Supreme Court order remanding this case and No. 74-3118 to this court pursuant to Mathews v. Eldridge, filed in the Supreme Court on February 24, 1976. To panel. wdt

Jul 9 Filed order (Williams) granting aplts an ext of time of 28 days in which to file their supplemental brief; brief due July 28, 1976. -dmf-

Jul 30 Filed aplts' motion for a 14-day ext of time in which to file supplemental brief. (S. Williams) ec

Aug 9 Filed order (Br) granting appellants' motion for a 14-day ext of time, to and including August 11, 1976. -pb-

Aug 13 Filed Aplts' motion for leave to file their brief (Supp.) in typewritten form pending repro. panel w/brief ec

Aug 30 Rec'd 25 Aplt's supplemental briefs (8/11/76) (motion for leave to file supp. brief in typewritten form, under submission) -pb-

Sept 7 Filed aples' motion for ext of time in which to file responsive supp. brief. (panel) ec

DATE	FILINGS—PROCEEDINGS

1976

Sept 13 Filed order (S.Wms.) granting aples 30 days ext (from Sept 10) of time in which to file responsive supp. brief. (Due Oct 10, 1976) ec

Sep 15 Filed, as of Sept 13, order (S. Williams) granting aplts' leave to file supplemental brief in typewritten form. -dmf-

Oct 11 Filed aples' (Buffington & Biner) motion for ext of time in which to file responsive supplemental brief. (Br, T., S. Williams)

Oct. 18 Filed order (S. Williams) granting aples' (Buffington, Biner, etc) an ext of 30 days, to and including November 11, 1976 to file their responsive brief. jr

Nov 12 Filed appellees' motion for ext of time in which to file their responsive supplemental brief. (panel) ec

Nov 15 Filed order (S. Williams) granting aplees an ext of time of 30 days to file responsive supplemental brief. (due December 10, 1976) -dmf-

Dec 8 Filed motion & order (S Williams) Upon due consideration of the motion of aples, it is hereby ORDERED that the aples' are granted an ext of time of 7 days, to and including Dec. 17, 1976, in which to file their responsive brief. -fn-

Dec 9 Filed order (T) upon consideration of the motion of appellees for a 7-day ext of time, it is hereby ordered that the aforesaid motion is granted. -dmf-

Dec 17 Filed orig. & 25 copies Aples' (Elliott, Molina, Buffington & Biner) supplemental briefs. (12/16/76) -pb to panel

DATE	FILINGS—PROCEEDINGS

1977

Mar 17 Filed appellees' motion for oral argument on aples' petition for rehearing & the pending reconsideration of the original decision required by the order of remand. (panel) ec

Mar 28 Filed aplts' (USA, et al) response to aples' motion for oral argument. panel ec

July 1 Filed order (Br, T & S Williams) aples' motion for oral argument is denied. jr

July 1 ORDERED OPINION (WILLIAMS) FILED & JUDG TO BE FILED & ENTD

July 1 Filed opinion—The judgments of the D.C.s are affirmed in part and reversed in part, and the cases are remanded.

July 1 Filed & Entd Judgment. -fn- J-34

Jul 13 Filed aplts' motion for ext of time in which to file petition for hearing. (panel) ec

Aug 4 Filed, as of July 28, order (SPENCER WILLIAMS) On consideration of aplts for a 30 days ext of time in which to file their petition for rehearing and suggestion for rehearing en banc, it is hereby ORDERED that the motion is GRANTED. (Petition due 8-14-77.) -fn-

Aug 17 Filed aplts' motion for ext of time in which to file Petition for rehearing. (panel) ec

Aug 24 Rec'd 25 copies Aplts' petition for rehearing and suggestion for rehearing en banc. 8-23 bc (panel)

Aug 27 Filed, as of 8/25/77, order (Br) on consideration of the motion of aplts for a 10 day ext of time in which to file their petition for rehearing and suggestion for rehearing en banc, it is hereby ORDERED that the aforesaid motion is GRANTED. jr

Aug 27 Filed, as of 8/25/77, 25 Aplts' Petition for Rehearing and Suggestion for Rehearing En Banc to (All Active Judges). jr 8/23/77

DATE	FILINGS—PROCEEDINGS

1977

Dec 16 Filed, as of Dec. 15, order (BR & T, CJJ & WILLIAMS, DJ) The petition for rehearing is denied and the suggestion for in banc rehearing is rejected. -fn-

1978

Jan 3 MANDATE ISSUED

Jan 17 Returned to D.C. Vols 1 thru 3 Originals and R/T's Vols 4 thru 6 ORIGINALS and 1 ENVELOPE OF EXHIBITS m

Mar 10 Recd SC Ltr. extending time for to file pet. for cert. to & incl. 4-14-78. Th.

Apr 10 Recd SC ltr extending time for filing pet for cert to and incl. 4-21-78. Th

Apr 27 Recd SC notice of filing on 4/21/78 petition for certiorari, assigned #77-1511. Th

Apr 27 Recd 3 copies of Aplts' petition for writ of certiorari. Th

Oct 5 Filed certified copy of Supreme Court order granting certiorari on October 2, 1978. (panel) pn

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil No. ———

EVELYN ELLIOTT, ET AL., PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, ET AL., DEFENDANTS

COMPLAINT

I

1. This is a class action seeking declaratory and injunctive relief to secure rights and privileges established by Title II of the Social Security Act, 42 U.S.C. Section 401, *et seq.*, and guaranteed by the Due Process Clause of the Fifth Amendment to the United States Constitution. This action specifically seeks to declare illegal and unconstitutional the procedure used by Defendants' Social Security Administration to adjust, terminate or suspend Title II benefits to Plaintiffs and all other persons similarly situated without giving notice of the grounds upon which said adjustments or suspensions are proposed or the opportunity for Plaintiffs to be heard prior to the time a decision is made to make such adjustments or suspensions. This action further seeks an injunction ordering Defendants to refrain from adjusting or suspending Title II payments (in order to recoup alleged prior overpayments) to Plaintiffs and all others similarly situated unless they are given notice of the grounds upon which said adjustments or suspensions are proposed and the opportunity for a hearing consistent with Due Process of Law prior to the time a decision is made to make such adjustments or suspensions.

2. Jurisdiction is conferred upon this Court by 28 U.S.C. Sections 1331 and 1361. Declaratory relief is sought pursuant to 28 U.S.C. Sections 2201 and 2202.

II

3. Plaintiff EVELYN ELLIOTT is a sixty-four-year-old cancer patient who resides in Honolulu, Hawaii.

4. Plaintiff ELLIOTT became eligible for old age benefits (OASDI) in August, 1970 and received same until May, 1972.

5. Plaintiff ELLIOTT also became eligible for disability benefits from April 20, 1970, which she received from May, 1970 through April 1972, at which time said benefits were terminated without a prior hearing.

6. Plaintiff BENITO MOLINA is a resident of Makaha, Hawaii.

7. Plaintiff MOLINA was born in the Philippine Islands in 1896, and has received old age security benefits (OASDI) since 1962. He is seventy-six (76) years old.

8. Plaintiff MOLINA's benefits were terminated as of June, 1972 without notice as to the reason for such termination and without opportunity for a prior hearing.

III

9. Plaintiffs ELLIOTT and MOLINA bring this action on their own behalf and on behalf of all other persons similarly situated pursuant to Federal Rules of Civil Procedure Rule 23(a) and (b)(2).

10. The class is composed of all social security old age disability insurance (OASDI) recipients who are being or who will be subjected to adjustment, suspension, or termination of their social security benefits pursuant to 42 U.S.C. Section 404(a) and (b) without adequate prior notice of the grounds for such action and without a prior hearing on disputed issues relating to such action.

11. The persons in the class referred to are so numerous that joinder of all members is impractical. There are questions of law and fact common to all members of the class.

12. The prosecution of separate actions by individual members of each class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible

standards of conduct for the party opposing the class.

13. The party opposing the class has acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

14. The representative Plaintiffs will fairly and adequately protect the interests of the class.

IV

15. Defendant ELLIOT L. RICHARDSON, in his capacity as duly appointed Secretary of the United States Department of Health, Education and Welfare, is charged with the administration and supervision of the provisions of Title II of the Social Security Act (hereinafter referred to as the "Act"), 42 U.S.C. Section 401 *et seq.*, and in particular with Title II of the Act, 42 U.S.C. Sections 223 and 423, relating to disability benefits, and Sections 202 and 402, relating to old age assistance.

16. Defendant SUNG DAI SEU, in his capacity as Pacific Area Manager, Social Security Administration, is charged with the administration of the Social Security Administration rules and regulations mentioned in paragraph 15 above in the Pacific Region, including the State of Hawaii.

V

FIRST CLAIM FOR RELIEF

A. *Plaintiff ELLIOTT*

17. Plaintiff ELLIOTT, at all times mentioned herein, was eligible to receive old age benefits under the criteria set forth in the Act. She received said old age benefits in the amount of $156.00 from August, 1970 until they were suspended in June, 1972.

18. In January, 1971, Plaintiff ELLIOTT contracted multiple meyloma, a severe and virulent form of bone cancer. She was operated upon in January, 1971 and thereby became eligible for social security disability benefits. She was released from the hospital in March, 1971, and is currently receiving chemotherapy treatments. She experiences pain and has extreme difficulty walking and

standing. Plaintiff ELLIOTT applied for disability insurance payments in May, 1971 and received OASDI benefits of $197 per month until they were suspended in June, 1972.

19. In early May, 1972, one Mr. Robert Wendell, an agent of Defendants, came to MRS. ELLIOTT's house. Since Plaintiff ELLIOTT was not at home, said Windham left a copy of a letter from the Honolulu District Office of the Social Security Administration (hereinafter, "District Office") with MRS. ELLIOTT's sister-in-law and roommate, Mrs. B. Langlois. Said letter apparently informed Plaintiff ELLIOTT that her social security benefits would be totally suspended from June, 1972 to November, 1972 to recover an alleged overpayment of $1,092.70. No reasons or specifications were given as to the reason for recovery or basis for computing the overpayment. (Plaintiff has no copy of the letter; nor does the District Office. A request for a copy of the letter has been made by Plaintiff's attorney. See Affidavit and Letter of Peter A. Lee appended as Exhibits A and A-1 hereto.)

20. Since Plaintiff ELLIOTT derives her primary support from social security benefits, on or about June 27, 1972, without consulting her attorney, she wrote a letter to the District Office explaining the difficulties she was having meeting living expenses, requesting an adjustment or explanation of the overpayment, and requesting an adjustment of her monthly check of $50.00. She anticipated severe difficulties in being able to survive if her primary source of income were completely cut off. Said letter, of which she did not keep a copy, was forwarded by the District Office to the Baltimore office of the Social Security Administration on or about June 30, 1972. The District Office did not keep a copy of said letter.

21. Plaintiff ELLIOTT did not receive her checks for June, July, and August, 1972, and has been forced to apply for welfare.

22. On or about August 4, 1972, MRS. ELLIOTT, through her attorney, filed at the Honolulu District Office a Request for Reconsideration, Request for a Hearing,

Refund Questionnaire, and "Without Fault" Questionnaire. (Copies appended as Exhibts B through E hereto.) A Social Security Counsel informed her attorney that the aforementioned forms would be processed in Baltimore, a three to six week process, before a decision could be made to schedule a hearing in Honolulu. A further delay of several months could result before a decision is rendered in a local hearing. (See Affidavit of Peter A. Lee appended as Exhibit A hereto.)

23. During the week of August 7, 1972, Plaintiff ELLIOTT received a check for approximately $442.00 from the Social Security Administration, apparently in response to her letter of June 27, 1972, mentioned in paragraph 20 above. Said check ostensibly returns to her the June, July, and August payments, less $50 per month.

24. Plaintiff ELLIOTT still, however, believes that she was "without fault" in receiving any overpayment, and that Defendants have illegally deprived her of her rightful benefits.

25. Plaintiff ELLIOTT states, in the forms mentioned in paragraph 22, a) that she believed she was entitled to the social security checks she received, b) that her sole sources of income were her social security checks for old age and/or disability benefits, c) that her current sole source of income is public welfare amounting to about $200 per month. Said welfare assistance is expected to be reduced to less than $100 in subsequent months, since the first payment included retroactive benefits.

B. *Plaintiff MOLINA*

26. Plaintiff MOLINA arrived in the Islands from the Philippines in 1921 to work on the sugar and pineapple plantations. He married a Hawaii resident in 1946 and became a United States citizen in 1953. MR. MOLINA has paid for social security insurance in the course of the forty years he has worked in the Islands.

27. In 1962, Plaintiff MOLINA became eligible to receive social security old age benefits (OASDI). He re-

ceived said benefits until they were terminated in June, 1972.

28. Although Plaintiff MOLINA has lived and worked in the Islands for many years, he does not communicate or understand English well, and needs an interpreter.

29. In late May, 1972, a Social Security Administration District Office employee asked MR. MOLINA or his immediate family about a woman MR. MOLINA had allegedly married in the Philippines prior to his arrival in Hawaii. MR. MOLINA admitted that there might have been such a marriage 56 years ago, but that he had never seen nor heard of his alleged wife since he left the Philippines. Nevertheless, he agreed to start divorce or annulment proceedings, although he could not and still does not understand why the Social Security Administration is interested in the matter.

30. In June, 1972, Plaintiff MOLINA did not receive his monthly social security check. Upon inquiry at the District Office (Waipahu), he was informed that, pending clarification of his marital status and/or his obtaining a decree of divorce or annulment, his social security benefits were suspended or terminated for an indefinite period.

31. Plaintiff MOLINA had been receiving $163 per month for OASDI. He has not received a check for June, July, and August.

32. Employees at Defendants' Waipahu District Office have not attempted to communicate to Plaintiff MOLINA in Tagalog, his native language.

33. Plaintiff MOLINA depends entirely on his social security check plus $31 per month from a part-time job for his monthly income for a total monthly income of approximately $194.00. Since his OASDI benefits have been terminated, he has been forced to live on a welfare check of $75. His total monthly income is now about $106., a net reduction of $88. He cannot live decently on this sum.

VI

34. Plaintiffs' benefits were terminated by Defendants and their agents pursuant to 42 U.S.C. Section 404(a) which provides in part that under certain circumstances "proper adjustment or recover shall be made" whenever there is an overpayment of social security benefits.

35. Section 204(b) of the Social Security Act, Title II, provides that "no recoupment of overpayments" of Title II benefits shall be taken pursuant to 42 U.S.C. Section 404(a) from any person who is "without fault" if such recovery "would defeat the purpose" of Title II or "would be against equity and good conscience."

36. 20 C.F.R. Section 404.508, a regulation promulgated by the Secretary to enforce the Social Security Act provides in pertinent part as follows:

> Adjustment of recovery will defeat the purposes of Title II in (but is not limited to) situations where the person from whom recovery is sought needs substantially all of his current income (including Social Security monthly benefits) to meet current ordinary and necessary living expenses.

37. Pursuant to 42 U.S.C. Sections 404(a) and (b) and regulations promulgated pursuant thereto, Defendants and their agents have made *ex parte* determinations:

(a) That Plaintiff ELLIOTT has received an overpayment of social security benefits amounting to $1,092.70;

(b) That said alleged overpayment should be recouped by terminating Plaintiff's social security benefits for the months of May, June, July, August, September, and October;

(c) That Plaintiff ELLIOTT is either

1) "At fault" within the meaning of 42 U.S.C. Section 404(b) in receiving overpayment; or,

2) "Without fault" within the meaning of 42 U.S.C. Section 404(b).

(d) That if Plaintiff ELLIOTT was "without fault" within the meaning of 42 U.S.C. Section 404(b), the

suspension of her social security benefits by Defendants would not defeat the purpose of Title II of the Act or be against equity and good conscience.

(e) That Plaintiff MOLINA is ineligible for further OASDI benefits pending his annulment or divorce.

(f) That Plaintiff MOLINA's benefits have been terminated as of June, 1972 for an indefinite period of time.

(g) That Plaintiff MOLINA is either "at fault" or "without fault" for receipt of unauthorized benefits within the meaning of 42 U.S.C. Section 404(b).

(h) That if Plaintiff MOLINA is "without fault", suspension of his benefits will not defeat the purposes of Title II of the Act or be against equity and good conscience.

38. Defendants have never given either Plaintiff ELLIOTT or Plaintiff MOLINA notice of the grounds for the immediately aforementioned determinations. Nor have they granted either Plaintiff the opportunity to be heard and to contest the above determinations before depriving them of social security (OASDI) benefits.

39. Defendants' summary, *ex parte* action "adjusting" Plaintiffs' benefits without notice or prior hearing on the issues of overpayment, fault, hardship, equity and good conscience violates the clear mandate of 42 U.S.C. Section 404(a) and (b).

40. By reason of their precipitous and ill-considered actions, Defendants have caused Plaintiffs and all other persons similarly situated extreme hardship, irreparable injury, suffering, and anxiety. Because Plaintiff ELLIOTT in particular suffers from a severe and debiliating form of cancer, Defendants have appreciably increased the chances of her demise by depriving her or threatening to deprive her of the necessities of life such as adequate food, clothing, medical care, and shelter. Plaintiffs and all other persons similarly situated have suffered and will continue to suffer severe and irreparable injury to their health and well-being as a result of such summary, *ex parte* "adjustments" of their Title II OASDI payments by Defendants until the statute and procedures described above are declared illegal or unconstitutional and their enforcement and execution in said illegal manner is enjoined by the Court.

41. Plaintiffs have no plain, adequate, or speedy remedy at law and this suit for mandatory and declaratory relief is their only means of securing such relief.

WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

VII

SECOND CLAIM FOR RELIEF

42. Plaintiffs allege and re-allege paragraphs 1 through 41 as if fully set forth herein.

43. Defendants' peremptory, *ex parte* action "adjusting" and suspending Plaintiffs' social security benefits without notice or prior hearing violates the Due Process Clause of the Fifth Amendment to the United States Constitution in that:

(a) Such actions effectively terminate and withhold benefits essential to maintain life itself without affording Plaintiffs and all other persons similarly situated reasonable and adequate notice and opportunity for a prior hearing, and;

(b) Such actions fail to afford Plaintiffs and all others similarly situated with notice of the substance of the evidence upon which the determination to "adjust", suspend, or terminate payments was made.

44. 42 U.S.C. Section 404(a), insofar as it permits Defendants to act as alleged in paragraphs 36 and 37 of this Complaint, deprives Plaintiffs and all other persons similarly situated of rights secured to them under the Fifth Amendment to the United States Constitution, and is, to that extent, unconstitutional.

WHEREFORE, Plaintiffs respectfully pray that this honorable Court:

1) Assume jurisdiction of this case;

2) Declare that this action be maintained as a class action pursuant to Federal Rules of Civil Procedure, Rule 23;

3) Enter a temporary restraining order and a preliminary mandatory injunction ordering Defendants to:

(a) Pay to Plaintiff ELLIOTT her regular monthly disability benefits for the months of June, July, and August without adjustment in the amount of $624.40, less $442.00 received, for a total of $150.00;

(b) Continue to pay Plaintiff ELLIOTT's disability benefits without adjustment at the rate of $197.47 per month;

(c) Resume payment of Plaintiff MOLINA's OASDI benefits immediately, pending the final outcome of this action;

(d) Pay to all members of Plaintiffs' class whose social security benefits are currently being adjusted pursuant to 42 U.S.C. Section 404(a) and (b) their regular monthly social security benefits, including all back benefits being withheld unlawfully;

(e) Provide Plaintiffs ELLIOTT and MOLINA and all other persons similarly situated with written notice and an opportunity for a hearing on the issues of overpayment, fault, hardship, and equity and good conscience prior to adjusting, reducing or terminating such person's benefits.

4) Enter a declaratory judgment pursuant to 28 U.S.C. Sections 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, declaring that Defendants' practice of making determinations under 42 U.S.C. Section 404 (a) and (b) without notice or prior hearing, violates the clear mandate of Title II of the Social Security Act, Sections 204(a) and (b).

5) Enter a declaratory judgment pursuant to 28 U.S.C. Sections 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, declaring that the Defendants' practice of making determinations under 42 U.S.C. Sections 404(a) and (b) without notice or prior hearing violates the due process clause of the Fifth Amendment to the United States Constitution.

6) Issue a permanent mandatory injunction ordering Defendants, their successors in office, agents and employees to provide Plaintiffs ELLIOTT and MOLINA

and all other persons similarly situated with written notice and an opportunity for a hearing on the issue of overpayment, fault, hardship, and equity and good conscience prior to adjusting social security old age, and disability insurance benefits, pursuant to 42 U.S.C. Sections 404(a) and (b).

7. Award the Plaintiffs and all other persons similarly situated such further and alternative relief as the Court may deem just and equitable.

DATED: Honolulu, Hawaii, August 17, 1972.

/s/ Evelyn Elliott
EVEYLN ELLIOTT
Plaintiff

By /s/ Stanley E. Levin
BENITO MOLINA
Plaintiff

By Stanley E. Levin
His Attorney

/s/ Peter A. Lee
PETER A. LEE
Their Attorney

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

STANLEY E. LEVIN, being first duly sworn on oath, deposes and says that he is the Attorney for the Plaintiff BENITO MOLINA above named; that he has read the foregoing Verified Complaint and knows the contents thereof; and that the matters and statements therein set forth are true to the best of his knowledge and belief.

/s/ Stanley E. Levin
STANLEY E. LEVIN
Attorney for Plaintiff
BENITO MOLINA

Subscribed and sworn to before me this 17th day of August, 1972.

/s/ Tomiko Sakai
Notary Public
First Judicial Circuit
State of Hawaii

My commission expires: 11-14-75

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

EVELYN ELLIOTT, being first duly sworn on oath, deposes and says that she is the Plaintiff above named; that she has read the foregoing Verified Complaint and knows the contents thereof; and that the matters and statements therein set forth are true to the best of her knowledge and belief.

/s/ Evelyn Elliott
EVELYN ELLIOTT

Subscribed and sworn to before me this 17th day of August, 1972.

/s/ Tomiko Sakai
Notary Public
First Judicial Circuit
State of Hawaii

My commission expires: 11-14-75

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil No. ———

EVELYN ELLIOTT, ET AL., PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, ET AL., DEFENDANTS

AFFIDAVIT OF PETER A. LEE

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

I, PETER A. LEE, being first duly sworn on oath, depose and say that:

1. I am an attorney licensed to practice in the State of Hawaii and am the attorney for Plaintiff Elliott in the above-entitled case;

2. On or about August 4, 1972 I went to the Honolulu District Office of the Social Security Administration (hereinafter "Administration") to seek clarification of the reasons for suspension of Mrs. Elliott's benefits;

3. A social security counselor, Mr. Mishima, showed me Mrs. Elliott's file;

4. Said file contained no copy of the letter sent by the Administration informing her of any overpayment;

5. However, said file did note that a social security agent had been sent to Mrs. Elliott's house to deliver a copy of a letter from the Administration notifying Mrs. Elliott that the Administration would try to recoup an overpayment of $1,092.00;

6. Said Mr. Mishima told me that Mrs. Elliott's checks from June through October would be terminated until the overpayment was fully recouped;

7. Said Mr. Mishima also told me that, should Mrs. Elliott request a hearing, the following delays would probably be inevitable:

(a) Two month delay while the Administration's Baltimore office decided whether to grant a Request for Reconsideration;

(b) A two to three week delay to send Mrs. Elliott's file to the Honolulu District Office;

(c) A three to six week delay before a hearing could be convened in Honolulu.

8. Said time periods could thus result in up to a four-month delay before Mrs. Elliott could even receive a hearing on the basis for the alleged overpayment. A further delay could result if the hearing officer took the case under submission;

9. Said Mr. Mishima could only conjecture as to the reason recoupment was sought;

10. I was further informed that the Honolulu office was merely a conduit for Social Security Administration disability decisions, and that no one in the District Office would be able to furnish me or Mrs. Elliott with the exact reason for suspension and recoupment.

11. Since neither I nor Mrs. Elliott has been able so far to procure a copy of the letter informing her of recoupment, I wrote to the Baltimore office of the Social Security Administration on or about August 8, 1972, requesting a copy of said letter of suspension. Copy of said letter is appended.

FURTHER affiant sayeth not.

/s/ Peter A. Lee
PETER A. LEE

Subscribed and sworn to before me this 16th day of August, 1972.

/s/ [Illegible]
Notary Public
Fifth Judicial Circuit
State of Hawaii

My commission expires: Oct. 29, 1973

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 72-3629

[Filed Oct. 19, 1972]

EVELYN ELLIOTT and BENITO MOLINA, Individually and on behalf of all others similarly situated, PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, Individually and in his capacity as Secretary, United States Department of Health, Education and Welfare; ET AL., DEFENDANTS

ANSWER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the within was duly hand delivered to Stanley Levin & Peter A. Lee, attorney at his last known address on October 19, 1972.

ROBERT K. FUKUDA
United States Attorney
District of Hawaii

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 72-3629

EVELYN ELLIOTT and BENITO MOLINA, Individually and on behalf of all others similarly situated, PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, Individually and in his capacity as Secretary, United States Department of Health, Education and Welfare; ET AL., DEFENDANTS

ANSWER

Come now ELLIOT L. RICHARDSON, individually and in his capacity as Secretary, United States Department of Health, Education and Welfare, and SUNG DAI SEU, individually and in his capacity as Pacific Area Manager, Social Security Administration, Department of Health, Education and Welfare, defendants herein, and in answer to the Verified Complaint of the plaintiffs filed herein on August 17, 1972 admit, deny and allege as follows:

1. Defendants admit the allegations set forth in paragraphs 15 and 16 of the Complaint.
2. Defendants deny the allegations set forth in paragraphs 11, 12, 13, 14, 39, 40, 41, 43 and 44 of the Complaint.
3. Defendants have insufficient knowledge or information upon which to base a belief as to the truth of the matters stated in all other paragraphs of the Complaint and therefore deny the same and put the plaintiffs on their proof thereof.

WHEREFORE, defendants pray that plaintiffs' request for the Court to assume jurisdiction of this case, and to declare a class action pursuant to the Federal Rules of Civil Procedure, Rule 23, the entry of a temporary restraining order and preliminary mandatory in-

junct'on, a declaratory judgment, and a permanent mandatory injunction be denied, and that the plaintiffs' complaint be dismissed.

DATED: October 19, 1972, at Honolulu, Hawaii.

/s/ Robert K. Fukuda
ROBERT K. FUKUDA
United States Attorney
District of Hawaii
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 72-3629

EVELYN ELLIOTT and BENITO MOLINA, Individually and on behalf of all others similarly situated, PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, Individually and in his capacity as Secretary, United States Department of Health, Education and Welfare; ET AL., DEFENDANTS

AMENDED ANSWER

EDWIN YOURMAN
Assistant General Counsel

PAUL MERLIN
Chief of Litigation

SARAH L. KEMBLE
Attorney

ROBERT K. FUKUDA
United States Attorney
District of Hawaii
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 72-3629

EVELYN ELLIOTT and BENITO MOLINA, Individually and on behalf of all others similarly situated, PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, Individually and in his capacity as Secretary, United States Department of Health, Education and Welfare; ET AL., DEFENDANTS

AMENDED ANSWER

Come now ELLIOT L. RICHARDSON, individually and in his capacity as Secretary, United States Department of Health, Education and Welfare, and SUNG DAI SEU, individually and in his capacity as Pacific Area Manager, Social Security Administration, Department of Health, Education and Welfare, defendants herein, and file this Amended Answer to the Verified Complaint of the plaintiffs filed herein on August 17, 1972.

1. Defendants have insufficient knowledge or information upon which to base a belief as to the truth of the matters set forth in paragraph 1 of the Complaint, and therefore deny the same and put the plaintiffs on their proof thereof.

2. Defendants deny the jurisdictional allegations of paragraph 2. Defendants affirmatively state that jurisdiction to review a decision of the Secretary arising under Title II of the Social Security Act is defined by and limited to 42 U.S.C. 405(g); and that because the plaintiffs have not exhausted their administrative remedies there is no "final decision" of the Secretary before this Court as required by that section.

3. Defendants deny the factual allegations of paragraphs 3 to 8 for lack of knowledge or information sufficient on which to form a belief.

4. Defendants deny the class action allegations of paragraphs 9 to 14.

5. Defendants admit the allegations of paragraphs 15 and 16.

6. Defendants deny factual allegations of paragraphs 17 to 34 for lack of knowledge or information sufficient on which to form a belief.

7. Defendants deny the allegations of paragraph 35 to the extent that they sate that the Social Security Act precludes the Secretary from recouping overpayments until the Secretary has determined whether or not recovery of the overpayment can be waived.

8. Defendants admit the allegations of paragraph 36.

9. Defendants deny the allegations of paragraphs 37 and 38 for lack of knowledge or information sufficient on which to form a belief.

10. Defendants deny the allegations of paragraph 39.

11. Answering the allegations of paragraph 40, defendants assert that they are conclusions and not statements of fact which require an answer; but if an answer is required defendants deny these allegations.

12. Defendants deny the allegations of paragraphs 41 and 43. Answering the allegations of paragraph 42, defendants reiterate the responses to paragraphs 1 to 41 as set forth herein.

WHEREFORE, defendants pray that plaintiffs' request for the Court to assume jurisdiction of this case, and to declare a class action pursuant to the Federal Rules of Civil Procedure, Rule 23, the entry of a temporary restraining order and preliminary mandatory injunction, a declaratory judgment, and a permanent mandatory injunction be denied, and that the plaintiffs' Com-

plaint be dismissed for lack of jurisdiction and failure to state a claim on which relief can be granted.

DATED: October 25, 1972, at Honolulu, Hawaii.

EDWIN YOURMAN
Assistant General Counsel

DEPARTMENT OF HEALTH,
EDUCATION & WELFARE

PAUL MERLIN
Chief of Litigation

SARAH L. KEMBLE
Attorney

ROBERT K. FUKUDA
United States Attorney
District of Hawaii

By /s/ Robert K. Fukuda
ROBERT K. FUKUDA
United States Attorney

Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil No. ———

EVELYN ELLIOTT, ET AL., PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, ET AL., DEFENDANTS

MOTION FOR DETERMINATION OF CLASS ACTION PURSUANT TO RULES OF CIVIL PROCEDURE RULE 23

Plaintiffs, through their undersigned counsel, move that, pursuant to Federal Rules of Civil Procedure Rule 23(a) and (b)(2), this Court enter an Order determining that this suit shall be maintained as a class action on behalf of themselves and all persons similarly situated who are, have been, or will be affected by the operation of 42 U.S.C. Section 401 *et seq.* and regulations promulgated pursuant thereto, on the grounds that it appears from their Complaint and Memorandum of Points and Authorities on file herein that the requirements of Federal Rules of Civil Procedure Rule 23(a), (b)(1), and (2) are met.

Plaintiffs further move that this Court define the class as all those persons in the State of Hawaii who receive old age and disability insurance (OASDI) payments under Title II of the Social Security Act, 42 U.S.C. Section 401 *et seq.*, and who are subject to a summary *ex parte* adjustment of said payments without notice or an opportunity for a due process hearing prior to such action affecting their payments.

Plaintiffs further move that this Court order the Defendants, their agents and employer, and all persons in active concert or participation with them, to furnish Plaintiffs the names of all persons whose disability and old age social security benefits are now being adjusted,

suspended, or terminated by *ex parte* administrative action; and further, that Defendants notify said social security beneficiaries that they are being represented as a class in the above entitled action, and that, pursuant to the granting of a temporary restraining order, payment of their disability and old age benefits will be immediately resumed. (A copy of such proposed notice is appended as Exhibit 1 hereto.)

EVELYN ELLIOTT and
BENITO MOLINA

By /s/ Peter A. Lee
PETER A. LEE
Their Attorney

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil No. 72-3629

EVELYN ELLIOTT, ET AL., PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, ET AL., DEFENDANTS

ORDER DETERMINING CLASS

The Court, having examined Plaintiffs' Verified Complaint, Motion for Determination of Class Action Pursuant to Federal Rules of Civil Procedure Rule 23(b)(2), and Points and Authorities in support thereof, and it appearing that the requirements of Rule 23 and Rule 23(b)(2) are met, it is hereby

ORDERED that this action be maintained as a class action;

IT IS FURTHER ORDERED that Plaintiffs EVELYN ELLIOTT and BENITO MOLINA be representatives of the class of all social security old age and disability benefit recipients resident in the State of Hawaii, who are being or will be subjected to adjustment of their social security benefits pursuant to 42 U.S.C. § 404(a) and (b) without adequate prior notice of the grounds for such action and without a prior hearing on disputed issues relating to such actions.

IT IS FURTHER ORDERED that this Order shall remain in full force and effect until further order of this Court; and

IT IS FURTHER ORDERED that copies of this Order be immediately served upon Defendants named herein.

DATED: Honolulu, Hawaii, October 17, 1972.

/s/ Samuel P. King
Judge
United States District Court of
Hawaii

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 72-3629

EVELYN ELLIOTT and BENITO MOLINA, Individually and on behalf of all others similarly situated, PLAINTIFF

vs.

CASPAR WEINBERGER, Individually and in his capacity as Secretary, United States Department of Health, Education, and Welfare; and SUNG DAI SEU, Individually and in his capacity as Pacific Area Manager, Social Security Administration, Department of Health, Education and Welfare, DEFENDANTS

PRE-TRIAL ORDER

The Court, having considered the arguments and representations of counsel at the hearing on defendants' Motion To Set Aside the Court's Preliminary Injunction of April 3, 1973 or, In the Alternative, For a Stay of the Preliminary Injunction of May 7, 1973 and at the pre-trial conference held on May 10, 1973, and being fully advised in the premises,

IT IS HEREBY ORDERED that Caspar Weinberger be, and hereby is, substituted for the defendant, Elliot L. Richardson pursuant to the provisions of Rule 25 of the Federal Rules of Civil Procedure; and

IT IS FURTHER ORDERED that the Court's preliminary injunction of April 3, 1973, by, and hereby is, stayed pending a final determination on the merits of this action; and

IT IS FURTHER ORDERED that this action be maintained as a class action and that the class consists of two sub-classes. The first sub-class will consist of all Social Security old age recipients, resident in the State of Hawaii who are being or will be subjected to recoupment

of their overpayments of Social Security benefits, pursuant to 42 U.S.C. § 404(a) and (b), which overpayment is based upon an annual earnings report submitted by the beneficiary reporting earnings in excess of levels contained in 42 U.S.C. § 403(b) and (f) requiring deductions of monthly benefits for the requisite month of work activity. Plaintiffs Silva and Vaquilar and Ortiz are proper representatives of the above-described class. The second sub-class will consist of all Social Security old age and disability recipients, resident in the State of Hawaii, who are being or will be subjected to recoupment of overpayments of their social security benefits pursuant to 42 U.S.C. § 404(a) and (b) for any reason whatsoever, other than for overpayments based upon annual earnings report as described in the above-mentioned first sub-class. Plaintiffs Elliott, Gaines and Yamasaki are proper representatives of the above-mentioned second sub-class;

IT IS FURTHER ORDERED that all other plaintiffs and/or intervenors be, and hereby are, dismissed from this action, without prejudice as to their further rights under Title II of the Social Security Act; and

IT IS FURTHER ORDERED that this Order shall remain in full force and effect until further order of this Court.

DATED: May 11, 1973, at Honolulu, Hawaii.

/s/ Samuel P. King
United States District Judge
for the District of Hawaii

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil No. 72-3629

EVELYN ELLIOTT, ET AL., PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, ET AL., DEFENDANT

PRELIMINARY INJUNCTION

This matter having come on to be heard before this Court on February 23, 1973, on Defendants' Motion for Extension of Time and Plaintiffs' Motion for Temporary Restraining Order and Memorandum in Support thereof, and, the Court having previously entered an Order Determining Class pursuant to Rule 23 of the Federal Rules of Civil Procedure; and, it appearing to the Court that:

(a) Defendant Richardson, individually and in his capacity as duly appointed Secretary, Department of Health, Education and Welfare, and Defendant Seu, individually and in his capacity as Pacific Area Manager, Social Security Administration, have adjusted, suspended, or terminated the old age and disability social security benefits of Plaintiffs and the class which they represent without affording said persons notice of reasons for such summary action, nor opportunity for a prior hearing;

(b) Immediate and irreparable injury, loss, and damage have resulted and will result to Plaintiffs and their class before this matter can be decided on its merits;

(c) Defendants will not suffer undue injury as a result of this Order;

(d) Plaintiffs have raised serious and substantial statutory and constitutional questions on the validity of the procedure used by Defendants to adjust payments of OASDI benefits under Title II of the Social Security Act;

IT IS HEREBY ORDERED that Defendant Richardson, his successor, his agents and employees at the Social

Security Administration's Payment Centers, and all persons in active concert or participation with them are restrained and enjoined from adjusting, terminating, or suspending social security old age and disability benefits accruing to Plaintiffs and their class without notice and an opportunity for a hearing before any adjustment is effectuated;

IT IS FURTHER ORDERED that Defendant Richardson, his successor, his agents and employees at the Social Security Administration's Payment Centers, and all persons in active concert or participation with them restore any and all money withheld since June 22, 1972, without notice and a prior hearing, from Plaintiffs UMEYUKI TANIGUCHI, CARL YAMASAKI, NANCY YAMASAKI, HIROKO SHIMABUKURO, LORRAINE ROBINSON, ISABELLE ORTIZ, JOHN V. VAQUILAR, RAYMOND GAINES, and JORDAN A. SILVA pending the holding of a pre-adjustment hearing in each of their individual cases;

IT IS FURTHER ORDERED that Defendant Richardson, his successor, his agents and employees at the Social Security Administration's Payment Centers, and all persons in active concert or participation with them continue to pay said Plaintiffs and the members of their class their full benefits, at their pre-adjustment levels until the members of said class have been afforded an opportunity for a prior hearing, and until there is made a final determination of the issues in the above-entitled case;

IT IS FURTHER ORDERED that Defendant Richardson, his successor, his agents and employees at the Social Security Administration's Payment Centers, and all persons in active concert or participation with them shall effectuate this Order by withholding the mailing of any letter or notice of downward adjustment of benefits, and otherwise processing downward adjustments, to any recipient of Title II Social Security benefits: (1) who is a member of the class herein; and (2) whose address con-

tains a State of Hawaii zip code designation (96700 et seq. and 96800 et seq.);

IT IS FURTHER ORDERED that this Order shall remain in full force and effect until modified by further order of this court, and;

IT IS FURTHER ORDERED that copies of this Order be immediately served upon: (1) the Defendants, Richardson or his successor, and Seu, individually and in their duly appointed capacities as, respectively, Secretary, United States Department of Health, Education and Welfare, and Pacific Area Manager, Social Security Administration; and (2) the supervising officials of all Social Security Administration Payment Centers.

THIS ORDER SHALL TAKE EFFECT on and after April 16, 1973.

DATED: Honolulu, Hawaii, April 3, 1973.

/s/ Samuel P. King
Judge
United States District Court
District of Hawaii

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil Action No. 72-3629

EVELYN ELLIOTT and BENITO MOLINA, ET AL.,
PLAINTIFFS

v.

CASPAR W. WEINBERGER, Individually and in his capacity as Secretary, United States Department of Health, Education and Welfare, ET AL., DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that defendants hereby appeal to the United States Court of Appeals for the Ninth Circuit from the order granting judgment in favor of plaintiffs entered in this action on the 19th day of February, 1974.

/s/ Harold M. Fong
HAROLD M. FONG
United States Attorney

SUPREME COURT OF THE UNITED STATES

No. 77-1511

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION AND WELFARE, PETITIONER

v.

EVELYN ELLIOTT, ET AL.

ORDER ALLOWING CERTIORARI

Filed October 2, 1978

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

EXHIBIT M

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil No. 72-3629

[Filed Jan. 9, 1973]

EVELYN ELLIOTT, ET AL., PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, ET AL., DEFENDANTS

AFFIDAVIT OF CARL YAMASAKI

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

CARL YAMASAKI, being first duly sworn on oath, deposes and says:

1. That he resides at Kukui Housing, Honolulu, Hawaii, with his wife and child.
2. That he is thirty-one years old.
3. That he has been receiving social security disability insurance (OASDI) since approximately June 1969 as a consequence of a disability incurred in 1964.
4. That he currently receives approximately $99.00 per month in OASDI benefits.
5. That on or about October 2, 1972, he received a letter from the Social Security Administration informing him that beginning January 1973 the Administration would begin to recoup a $207.90 overpayment assessed as the result of a "processing error."
6. That he contacted the District Office, pursuant to said letter, and submitted evidence showing that he is no longer receiving Workmen's Compensation.

7. That the officials at the District Office have not informed him of either the right or necessity of filling out a Without Fault Questionnaire or Request for Reconsideration.
8. That he does not know why the Administration is recouping his benefits or what the substance of the alleged "processing error" is.

Further affiant sayeth naught.

/s/ Carl Yamasaki
CARL YAMASAKI

Subscribed and sworn to before me
this 22nd day of December, 1972.

/s/ Tomiko Sahai
Notary Public
First Judicial Circuit
State of Hawaii

My commission expires: 11-14-75

EXHIBIT L

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil No. 72-3629

[Filed Jan. 9, 1973]

EVELYN ELLIOTT, ET AL., PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, ET AL., DEFENDANTS

AFFIDAVIT OF NANCY YAMASAKI

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

NANCY YAMASAKI, being first duly sworn on oath, deposes and says:

1. That she resides at Kukui Gardens, 1351 Aala Street, #201, Honolulu, Hawaii, with her husband, child, and mother.
2. That she is married to Carl K. Yamasaki, whose affidavit is also being submitted herewith.
3. That her husband, Carl K. Yamasaki, is receiving Social Security Disability benefits, of which she also receives a statutory share.
4. That on or about October 2, 1972, she received a letter from the Administration informing her that due to a "processing error," an overpayment of $207.90 had occurred. (Copy of letter attached as Exhibit A)
5. That her monthly benefits of $10.60 would be withheld from January 1973 through October 1973.
6. That in compliance with the instructions on said letter, she went to the District Office in Honolulu within thirty days of October 2, 1972.

7. That she attempted to get clarification from District Office officials about the reasons for the recoupment, and about what evidence she had to submit to prevent a recoupment.
8. That the District Office worker told her only that the District Office would write to Baltimore to request clarification on to request adjustment of the recoupment.
9. That at no time was she instructed by the District Office as to what evidence or information she should bring forward to stop the recoupment.
10. That the letter from the Administration states in the last sentence that "Unless we hear from you within 30 days, we shall withhold benefits as indicated above."
11. That she assumes that the District Office wrote to Baltimore as she was promised (in paragraph 8 supra).
12. That as of this date, she has not heard anything further from the Administration and does not know whether her benefits will be recouped, but assumes that they will be, beginning January 1973.
13. That recoupment will work a severe burden on herself, her husband, and her family.

Further affiant sayeth naught.

/s/ Nancy Yamasaki
NANCY YAMASAKI

Subscribed and sworn to before me this 28th day of December, 1972.

/s/ Tomiki Sakai
Notary Public
First Judicial Circuit
State of Hawaii

My commission expires: 11-14-75

EXHIBIT "A"

[SEAL]

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
Baltimore, Maryland 21241

October 2, 1972

BUREAU OF
DISABILITY INSURANCE

REFER TO:

DI:BP:E
576-38-2979 HB2

Mrs. Nancy Yamashki:
Apt 201
1351 Aala St
Honolulu HI 96817

Dear Mrs. Yamashki:

Our records show you received **$207.90** more in social security benefits than you should have. Due to a processing error, you were paid **$40.30 for February through** August 1972, instead of $10.60 for that period of time. As a result, you were overpaid the above amount.

If you believe that this determination is not correct, you may request that your case be reexamined. If you want this reconsideration, you must request it not later than 6 months from the date of this notice. You may make any such request through any social security office. If additional evidence is available, you should submit it with your request.

To recover the overpayment, we shall withhold your benefits beginning with the check you would normally receive in January 1973. The next check that you will receive after the full overpayment has been withheld will be for $19.80. It will be sent to you about November 3, 1973. Thereafter, your regular monthly benefits of $20.70 will be resumed.

Under social security law, any overpayment must be withheld from benefits or paid back unless *both* of the following are true:

1. The overpayment wasn't your fault in any way and you cashed the check(s) because you thought they were correct, *and*
2. You couldn't meet your necessary living expenses if you had to pay back the overpayment or have it withheld from your social security benefits; or it would be unfair for some other reason.

To decide whether repayment would cause you financial hardship, we shall need a statement of your assets, and monthly income and expenses.

If you think you meet *both* conditions or if withholding the entire amount of your monthly benefit will cause you financial hardship, call, write, or visit any social security office within 30 days from the receipt of this letter. Please take this letter with you if you visit the office. Unless we hear from you within 30 days, we shall withhold benefits as indicated above.

Sincerely yours,

/s/ C. C. Hall
C. C. HALL
Assistant Director

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil No. 72-3629

[Filed Jan. 9, 1973]

EVELYN ELLIOTT, ET AL., PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, ET AL., DEFENDANTS

AFFIDAVIT OF JOHN V. VAQUILAR

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

JOHN V. VAQUILAR, being first duly sworn on oath, deposes and says:

1. That he resides at 1421 Alapai Street, Apartment G, Honolulu, Hawaii.
2. That he was born on June 24, 1903 and is 69 years old.
3. That he first became eligible for social security old age benefits in 1966.
4. That until July 1972 he had been receiving approximately $161.00.
5. That in April 1972 he was informed by a letter from the Social Security Administration that he was liable to the Administration for an overpayment of approximately $909.90 due to an Administrative error.
6. That if in fact said overpayment occurred, he was without fault as to any error.
7. That he in fact believed said $909.90 to be due to him for back benefits.
8. That said letter informed him of his right to come forward within 30 days to contest the said overpayment, or to make an adjusted repayment.

9. That he went to the Honolulu District Office and arranged to repay the said $909.90 at $80 per month.
10. That he did not fill out the "Without Fault" Questionnaire and he was not informed that a finding of lack of fault might enable him to escape recoupment altogether.
11. That he feared that if he did not agree to pay back the money on an adjusted basis, his benefits would be completely suspended.
12. That he depends upon his OASDI benefits for the support and livelihood of his wife and eleven year old child.

Further affiant sayeth naught.

/s/ John V. Vaquilar
JOHN V. VAQUILAR

Subscribed and sworn to before me this 19th day of December, 1972.

/s/ Tomiki Sakai
Notary Public
First Judicial Circuit
State of Hawaii

My commission expires: 11-14-75

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil No. 72-3629

[Filed Jan. 9, 1973]

EVELYN ELLIOTT, ET AL., PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, ET AL., DEFENDANTS

AFFIDAVIT OF RAYMOND GAINES

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

RAYMOND GAINES, being first duly sworn on oath, deposes and says:

1. That he resides at 143-A Prospect Street, Honolulu, Hawaii.
2. That he is sixty-two years old and is and has been eligible for social security old age benefits of $125.00 since December 1971.
3. That in October 1972, his check for $125.00 did not arrive, nor has any money from social security been forthcoming since October 1972.
4. That on or about November 16, 1972, he contacted the Honolulu District Office, which called Baltimore, Maryland, to clarify the reasons for terminating his benefits.
5. That said District Office told him that he might be receiving a check in December.
6. That prior to termination of his check he has never received no notification by letter or personal visitation informing him of the reasons for termination, if any,

nor has he been given an opportunity for a hearing as to any issue concerning termination of his benefits.

Further affiant sayeth naught.

/s/ Raymond Gaines
RAYMOND GAINES

Subscribed and sworn to before me this 26th day of Dec., 1972.

/s/ Gladys L. Kim
Notary Public
First Judicial Circuit
State of Hawaii

My commission expires: 11-26-75

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil No. 72-3629

[Filed Jan. 11, 1973]

EVELYN ELLIOTT, ET AL., PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, ET AL., DEFENDANTS

AFFIDAVIT OF ISABELLE ORTIZ

STATE OF HAWAII)
) SS.
CITY AND COUNTY OF HONOLULU)

ISABELLE ORTIZ, being first duly sworn on oath, deposes and says:

1. That she resides at 84-937 Hana Street, Waianae, Hawaii.
2. That she is sixty-six years old and has been and is eligible to receive social security old age benefits (OASDI).
3. That she first became eligible to receive OASDI in May 1971 when she became sixty-five years old.
4. That in May 1971 she retired from her job at Pearl Harbor Naval Base and began receiving OASDI benefits of $70.40 beginning in June 1971.
5. That in approximately February 1972, she received a letter from the Social Security Administration stating that an overpayment had been made, and that she owed the Administration $492.80 for an overpayment.
6. That she contacted the Waipahu Branch Office, but could not get any information about the reasons for said recoupment.
7. That she depends upon her OASDI benefits for survival.

8. That neither the Branch Office nor the said letter informed her of her rights to come forward with evidence, her right to waiver of fault, or her right to have a reconsideration.
9. That, as a consequence of the said recoupment, her benefits were cut off completely from March through October, 1972.

Further affiant sayeth naught.

/s/ Isabelle Ortiz
ISABELLE ORTIZ

Subscribed and sworn to before me this 28th day of December, 1972.

/s/ [Illegible]
Notary Public
First Judicial Circuit
State of Hawaii

My commission expires: 12-2-74

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil No. 72-3629

[Filed Feb. 15, 1973]

EVELYN ELLIOTT, ET AL., PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, ET AL., DEFENDANTS

AFFIDAVIT OF JORDAN A. SILVA

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

JORDAN A. SILVA, being first duly sworn on oath, deposes and says:

1. That he resides at 3366 Keanu Street, Honolulu, Hawaii.
2. That he was born on February 22, 1902, and is seventy years old.
3. That he first became eligible to receive social security old age benefits in 1964.
4. That until June 1972 he was receiving approximately $99 per month.
5. That in June 1972 his social security old age benefits were cut off without notice or opportunity for a hearing.
6. That he called the District Office and was informed that social security administration was probably trying to recoup an overpayment, that said overpayment may have occurred because he allegedly earned more than $1680 in 1971, and that his checks would be continued after about two months.

7. That his social security checks have never been resumed, and he has been deprived of benefits continuously since June 1972.
8. That there is an issue of fact as to how much income he actually earned in 1971-1972.
9. That said letter of recoupment stated that his benefits would be suspended until the alleged overpayment is recovered by the Administration.
10. That his benefits will be suspended for approximately sixteen months.
11. That although he has a part-time job as a janitor at the Bank of Hawaii, he does not know whether he will be able to work much longer.
12. That he depends upon his social security old age benefits to help support himself and his wife.

Further affiant sayeth naught.

/s/ Jordan A. Silva
JORDAN A. SILVA

Subscribed and sworn to before me this 14th day of February, 1972.

/s/ Tomiki Sakai
Notary Public
First Judicial Circuit
State of Hawaii

My commission expires: 11-14-75

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 72-3639

EVELYN ELLIOTT, BENITO MOLINA, Individually and on behalf of all others similarly situated, PLAINTIFFS

v.

ELLIOT L. RICHARDSON, Secretary Department of Health, Education, and Welfare, DEFENDANT

AFFIDAVID OF BERNARD POPICK

BALTIMORE COUNTY)
) SS
STATE OF MARYLAND)

I, Bernard Popick, being duly sworn, depose and say as follows:

1) I am the Director of the Bureau of Disability Insurance of the Social Security Administration, Department of Health, Education, and Welfare.

2) The Bureau of Disability Insurance is located in Baltimore, Maryland. It provides direction for the nationwide administration of the disability insurance program. It is charged with the responsibility of reviewing initial disability determinations made by State Agencies, making reconsideration determinations on disability claims which have been initially disallowed, maintaining disability claims and benefit accounts and related processing controls, and certifying disability benefit payments. The Bureau of Disability Insurance also makes overpayment determinations in disability cases and in such cases determines whether recovery of an overpayment should be waived pursuant to 42 U.S.C. 404(b).

3) In connection with my official duties I have custody of the claims folder of the plaintiff, Evelyn Elliott, (hereinafter referred to as the plaintiff), pertaining to her claim for disability insurance benefits, based on her

social security earnings record. The plaintiff's disability claims folder also contains pertinent data on the plaintiff's claim for retirement insurance benefits. My examination of this folder reveals the following.

4) On May 25, 1970 the plaintiff filed an application for reduced retirement insurance benefits payable beginning at age 62 pursuant to 42 U.S.C. 402(a). On or about June 15, 1970 the Administration awarded the plaintiff retirement insurance benefits at the rate of $141.40 a month, effective beginning in August 1970, the month the plaintiff attained age 62. The monthly benefit rate was later increased to $156.10, effective in January 1971, due to legislation raising the monthly benefit amount.

5) Subsequently, on April 20, 1971, the plaintiff filed an application for disability benefits payable under 42 U.S.C. section 423. The Administration awarded disability insurance benefits to the plaintiff on July 13, 1971. This award was effective beginning with the month of May 1970, based on a finding that disability had commenced on October 30, 1969.[1] The plaintiff's disability benefit rate was $179.40 a month from May, 1970 through December 1970. It was increased to $197.40 a month effective in January 1971, due to legislation increasing the monthly benefit amount.

6) Section 202(k)(4) of the Social Security Act, 42 U.S.C. 402(k)(4), provides that any individual who is entitled for any month to both a retirement insurance benefit and a disability benefit shall be entitled only to the larger of such benefits for such month, except that, if such individual so elects, he shall instead be entitled to only the smaller of such benefits for such month. Under this section the plaintiff Evelyn Elliott, having been simultaneously entitled to both retirement insurance benefits and disability benefits for months beginning with August 1970, was entitled to receive only the larger of

[1] 42 U.S.C. 423(a)(1) provides that entitlement to disability insurance benefits begins six full months after the onset of disability.

the two benefits, i.e., the disability benefit, for all months in which the simultaneous entitlement continued.

7) The Administration advised the plaintiff of the award of disability benefits in a letter to her dated August 13, 1971. This letter informed the plaintiff of the amount of the monthly disability benefit, and further advised her:

> "This disability benefit replaces the monthly retirement benefit you were previously receiving. Your next monthly check will include all disability benefits due you less the payments you have already received. Thereafter, you will receive your regular monthly payments."

8) On August 12, 1971 the Administration sent the plaintiff a check for $1,214.70. This check, which was the "next monthly check" referred to in the letter quoted in the previous paragraph, represented back disability benefits due for the months of May 1970 through August 1971 ($3,014.40) minus the total amount of the retirement insurance benefits which the plaintiff had received for the months of August 1970 through July 1971 $1,799.70). This was consistent with 42 U.S.C. 402(k)(4), permitting payment of only the disability benefit for months during which the plaintiff was entitled to both retirement insurance benefits and disability insurance benefits.

9) A record in the claims folder dated August 3, 1971 indicates that as of that date the Administration was aware of the plaintiff's simultaneous entitlement to both retirement insurance benefits and disability insurance benefits,[2] and that on that date the Administration's operating personnel were directed to terminate payments of retirement insurance benefits, consistent with 42 U.S.C. 402(k)(4). However, apparently due to an error, termination of retirement insurance benefits was not effectuated at this time, and payment of retirement insurance benefits continued for the months of August 1971 through February 1972.

[2] It appears that the Administration was aware of the simultaneous entitlement despite the fact that on her disability application of April 20, 1971 the plaintiff incorrectly answered: "No" to the question: "Have you (or has someone on your behalf) ever filed an application for a period of disability or social security benefits before?"

10) In March 1972 the Administration discovered through a "systems alert" that is, a computed generated message designed for this purpose, that the termination action attempted on August 3, 1971 had not been effectuated. The Administration then examined the claims folder of the plaintiff and noted that she had received retirement benefit payments in addition to her disability benefits for the months of August 1971 through February 1972. The Administration therefore determined that the plaintiff had been overpaid for seven months at $156.10 a month, totalling $1,092.70.

11) On March 13, 1972 the Administration stopped payment of the plaintiff's retirement benefits beginning with the month of March 1972.[3] Payment of disability benefits was not stopped at this time.

12) On or about March 16, 1972 the Administration's Bureau of Disability Insurance forwarded to the Social Security District Office in Honolulu a letter to the plaintiff, and directed that the District Office personally deliver it to the plaintiff. This letter advised the plaintiff that her disability benefits would be withheld to recoup the overpayment of retirement benefits in the amount of $1,092.70. This letter stated in full as follows:

> "Our records show you received $1,092.70 more in social security benefits than you should have. This amount represents retirement insurance benefits paid to you for August 1971 through February 1972 at $156.10 per month. No retirement insurance benefits were payable to you after July 1971 as you became entitled to disability payments.
>
> If you believe that this determination is not correct, you may request that your case be reexamined. If

[3] This action was effective in April 1972, that is, April was the first month that retirement benefits were not actually paid. Social Security benefits for which an individual is entitled in a given month are actually payable in the following month.

you want this reconsideration, you must request it not later than 6 months from the date of this notice. You may make any such request through any social security office. If additional evidence is available, you should submit it with your request.

To recover the overpayment, we shall withhold your benefits beginning with the check you would normally receive in June 1972. The next check that you will receive after the full overpayment has been withheld will be for $91.70. It will be sent to you about Nov. 3, 1972. Thereafter, your regular monthly benefits of $197.40 will be resumed.

Under social security law, any overpayment must be withheld from benefits or paid *back* unless both of the following are true:

1. The overpayment wasn't your fault in any way and you cashed the check(s) because you thought they were correct, *and*

2. You couldn't meet your necessary living expenses if you had to pay back the overpayment or have it withheld from your social security benefits; or it would be unfair for some other reason.

To decide whether repayment would cause you financial hardship, we shall need a statement of your assets, and monthly income, and expenses. If you think you meet both conditions, call, write, or visit any social security office within 30 days from the receipt of this letter. Please take this letter with you if you visit the office. Unless we hear from you within 30 days, we shall withhold benefits as indicated above." (Emphasis original)

13) Administrative records in the claim folder indicate that the letter referred to in the preceding paragraph was personally delivered to the plaintiff's home on April 28, 1972. The record also reflects that since the plaintiff was not home at the time, the letter was left with the plaintiff's sister-in-law.

14) On May 24, 1972, the Bureau of Disability Insurance mailed the plaintiff another letter again advising her that her disability benefits would be withheld for the months of May 1972 through September 1972 and part of October 1972 to recover the overpayment of $1092.70.

15) The Administration's action to recover the overpayment to the plaintiff was effective in June 1972; that is, the first disability insurance payment to be withheld to recover the overpayment was the payment which would normally have been received on or about June 3, 1972.

16) In a letter to the Administration dated June 27, 1972 the plaintiff stated in part: "I am sorry about the misunderstanding and error which gave me an overpayment on my social security. I wish to repay the overage [*sic*] * * *." The plaintiff then stated in this letter that withholding her entire benefit check would cause her hardship. She requested the Administration to withhold $50.00 a month rather than the entire benefit check.

17) Administration records show that on July 3, 1972 Mr. Stan Levin, an attorney representing the plaintiff, contacted the Honolulu District Office concerning the Administration's overpayment action in the plaintiff's case. At that time Mr. Levin requested that benefit payments to the plaintiff be resumed immediately; however no request for waiver or reconsideration was filed at that time. Mr. Levin was given the appropriate forms (the "Refund Questionnaire" and the "'Without Fault' Questionnaire") for supplying the information to establish a basis for waiver of recovery of the overpayment. Mr. Levin apparently advised Administration personnel at that time that he would arrange to have the plaintiff complete these forms and would mail them to the District Office.

18) On or about August 4, 1972 the plaintiff requested reconsideration of the Administration's overpayment determination. She stated as her reason for this request: "I merely received notification that there had been an overpayment of disability benefits. I do not know why there had been an overpayment and have never had a chance to find out why. I would like to have a hearing

on this matter." In addition on August 4, 1972 the plaintiff requested that the Administration waive recovery of the overpayment. In support of the request for waiver the plaintiff filed a "'Without Fault' Questionnaire" and a "Refund Questionnaire" explaining her financial status. In the "'Without Fault' Questionnaire" the plaintiff stated that she accepted the full payment of both disability insurance benefits and retirement insurance benefits because she believed she was entitled to both payments. Also on August 4, 1972, the plaintiff requested an evidentiary hearing on the overpayment determination to be conducted by an administrative law judge pursuant to 20 C.F.R. 404.917. She stated as her reason for this request: "I have never had a chance to dispute the cutoff of my benefits and do not believe that my whole check (or even part of it) should be taken pending a hearing. I think Soc. Sec. has the burden of proving I am not entitled to benefits."

19) The claims folder contains a letter dated August 9, 1972, received in the Honolulu District Office August 10, 1972, from Peter A. Lee of the Legal Aid Society of Hawaii. In this letter Mr. Lee stated that the plaintiff had received a letter on April 28, 1972 hand-delivered by an agent of the Social Security Administration, advising her of the Administration's intent to recoup an alleged overpayment. Mr. Lee's letter further stated that the plaintiff had apparently lost the letter which had been delivered to her on April 28, and requested the Administration to send him a copy of the letter.

20) In a written notice to the plaintiff dated August 10, 1972 the Administration advised the plaintiff that in accordance with her request for partial rather than full withholding of her disability benefits, only $50.00 a month would be withheld from benefits due for the months of May 1972 through January 1974. This notice further advised the plaintiff that $42.70 would be withheld from the benefit due for February 1974; and that effective with the benefit payable for the month of March 1974, her regular monthly benefit of $197.40 would be resumed. This notice also advised the plaintiff

that she would shortly be sent a check for $442.20, representing benefits due her through July, 1972—i.e., that the May, June, and July benefits which previously had been fully withheld were being reinstated minus $50.00 withheld for each of those months. ($197.40—$50.00 for three months).

21) On or about August 10, 1972 the Administration issued the plaintiff a check for $442.20, in accordance with its notice to her of August 10, 1972.

22) The plaintiff filed this civil action on August 17, 1972, before the Administration could act on her request for waiver or recovery of the overpayment. At a hearing before this court on August 25, 1972, it was agreed that the Secretary would reinstate all social security disability benefits which had been withheld from the plaintiff to recoup the overpayment, and that the Secretary would continue to pay the plaintiff her full disability benefits as they come due, without further recoupment, pending the court's disposition of this civil action.

23) On August 29, 1972, pursuant to the agreement described in the preceding paragraph, the Administration reinstated to the plaintiff all disability benefits which had been withheld for the months of May 1972 through August 1972 to recoup the overpayment to the plaintiff. Accordingly the Administration at that time issued to the plaintiff a check for $200.00 (4 x $50.00) covering this amount. The Administration has resumed payment of the plaintiff's full monthly disability benefits as they come due,[4] and will continue to make such payments pending the court's disposition of this civil action. Administrative action on the plaintiff's request for reconsideration and a hearing have been deferred pending this Department's preparation of the defense of this civil action and the court's disposition of this matter.

24) On January 14, 1971 the Commissioner of the Social Security Administration approved a policy whereby in any case where Title II social security benefits are

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[4] The full amount of the monthly disability benefit being paid to the plaintiff is now $236.90. The benefit amount has been increased due to recent amendments to the Social Security Act.

withheld to recover an overpayment the beneficiary must be advised (at the time he is notified of the Administration's action) of his right to request reconsideration by the Administration of overpayment determination and of the provisions of the Act (42 U.S.C. 404(b)) providing for waiver of recovery of the overpayment in certain specified cases. This policy is also now set forth in the Social Security Regulations: 20 C.F.R. sections 404.502a and 404.907 (37 Federal Register, May 25, 1972). In May 1971 this policy was incorporated into section 5503(a) of the Social Security Claims Manual, which contains instructions to operating personnel as to the processing of social security claims. The pertinent portion of Claims Manual section 5503(a) reads as follows:

> "When it is determined that an incorrect payment has been made, the person liable should be notified in writing (see § 5508 for sample letters). The notice will inform the person of:
>
> "(1) The incorrect payment made, how, and when it occurred. (If the overpayment resulted from the entitlement of another beneficiary, the adversely affected individual(s) must be informed of the name, relationship to the WE, and basis for entitlement of the new beneficiary.)
>
> "(2) The right to request reconsideration of the overpayment determination.
>
> "(3) The required recovery.
>
> "(4) The proposed adjustment or the demand for repayment where adjustment is not possible.
>
> "(5) The waiver provisions of the law (Social Security Act, secs. 204(b) or 1870(c)).
>
> "(6) The availability of partial adjustment or partial refund.
>
> "(7) The need to notify the DO promptly if he feels that the circumstances in this case would justify waiver, partial adjustment, or partial refund."

Section 5503(a) also provides for *personal delivery* of this notice to the beneficiary in all cases where a disabled beneficiary or any member of his family living in his household is overpaid, regardless of the number of monthly benefits involved. Section 5503(a) also provides as a general rule for personal delivery of the notice in nondisability cases where the overpayment is large (exceeding equivalent of six months' benefits) *and* the beneficiary does not have reason to know about the overpayment.

25) Section 5503(a) provides (with two exceptions not pertinent in the case of the plaintiff Evelyn Elliott) that the Administration must give the beneficiary advance notice of action to recover an overpayment, and an opportunity to contest the correctness of such action. The pertinent part of 5503(b) is as follows:

> "Before we start to adjust the overpayment against the benefits due a beneficiary, he or his payee will normally be given reasonable opportunity to contest the correctness of the determination or to establish that a basis exists for waiver or partial adjustment. The notice to the beneficiary will advise him that adjustment will be deferred 30 days. However, actual adjustment may at the discretion of the reviewing office be extended to a longer period when the facts in a given case, including but not limited to time case is being worked, cutoff dates, mailing time, etc., indicate that a 30-day period would be inadequate for consideration of the matter and reply by the beneficiary and reviewing office processing time."

26) Section 5503(c) of the Social Security Claims Manual provides in pertinent part:

> "If the person responds raising some question about the correctness of the determination of overpayment, or raises a question about recovery, waiver or partial adjustment, the DO will obtain the necessary evidence and prepare a recommendation to the reviewing office for disposing of the case. *Thus, if the person liable requests reconsideration of the substantive*

determination and it appears that the determination will be affirmed, the DO will develop the possibility of waiver of adjustment or recovery of the overpayment at the same time it receives evidence to resolve the request for reconsideration. This is necessary since, if the substantive determination is affirmed the Reconsideration Determination will cover both issues (§ 8737).

"Where reconsideration of the overpayment determination, waiver, or partial adjustment development is initiated, withholding to recoup the overpayment will be further deferred and payment will be continued until development has been completed, if the beneficiary is otherwise entitled to benefits. If development will not be completed before the expiration of the 30-day period, the DO will utilize teletype to advise the reviewing office." (Empasis original)

The effect of the foregoing provisions of Claims Manual section 5503(c) when a beneficiary questions the correctness of the overpayment determination, is to delay any recoupment of an overpayment until there has been a reconsideration determination of the overpayment determination and an initial determination with respect to waiver.

27) As demonstrated in paragraph 12, supra, the Administration's notice to the plaintiff complied with the requirements of Claims Manual Section 5503 set forth in paragraphs 24-26, supra, in every respect except that the plaintiff was not notified of the possibility of partial adjustment. As paragraph 13, supra demonstrates, this notice was personally delivered to her home on April 28, 1972, which was over 30 days before the Administration took action to recover the overpayment by withholding the plaintiff's disability benefits. The plaintiff was afforded the requisite advance notice of the Administration's proposed action, and was advised of her right to reconsideration and to establish that she qualified for waiver, and was informed that she should contact the Administration within 30 days if she wished to question the Administration's proposed action. However, as shown

in paragraph 16, supra, the plaintiff did not contact the Administration until June 27, 1972, almost two months after she received the notice, and almost a month after the Administration had stopped her benefit payments. When the plaintiff finally did contact the Administration on June 27, 1972 she did not protest the overpayment determination in any manner, nor did she ask for waiver; on the contrary she stated that she wished to repay the overpayment. She asked for partial rather than full adjustment of her benefit payments. Five weeks later the Administration granted this request restoring to her all benefits previously withheld which had exceeded the partial adjustment requested by the plaintiff. See paragraphs 20-21. The plaintiff did not request reconsideration or waiver of recovery of the overpayment until August 4, 1972. The Administration was continuing to recoup the overpayment at the rate of only $50 a month, as requested and authorized by the plaintiff, at the time this civil action was filed on August 17, 1972.

28) Sections 404.901 et seq. of Social Security Administration Regulations No. 4, 20 C.F.R. 404.901 et seq. set forth a four-step administration process including an initial determination, (section 404.905 of Social Security Administration Regulations No. 4, 20 C.F.R. 404.905); a reconsidered determination (section 404.914 of Social Security Administration Regulations No. 4, 20 C.F.R. 404.914); an administrative hearing *de novo* before an independent administrative law judge (section 404.917 of Social Security Administration Regulations No. 4, 20 C.F.R. 404.917); review by the Appeals Council of the Social Security Administration, (section 404.945 of Social Security Administration Regulations No. 4, 20 C.F.R. 404.945). After exhaustion of these administrative remedies section 205(g) of the Act, 42 U.S.C. 405(g) provides for judicial review.

29) Section 205(l) of the Social Security Act, 42 U.S.C. 405(l) authorizes the Secretary to delegate his powers under Title II as follows:

"The Secretary is authorized to delegate to any member, officer, or employee of the Department of Health,

Education, and Welfare designated by him any of the powers conferred upon him by this section, and is authorized to be represented by his own attorneys in any court in any case or proceeding arising under the provisions of subsection (e)."

30) The Secretary has delegated the responsibility for administering the social security program under Title II to the Commissioner of the Social Security Administration. 33 FR 5836, April 16, 1968. This authority may be redelegated. 33 FR 5837, April 16, 1968.

31) There are six regional Payment Centers of the Social Security Administration located in New York, Philadelphia, Chicago, Birmingham, Kansas City, and San Francisco. The six regional Payment Centers are charged with the responsibility of rendering initial and reconsideration determinations in claims for dependents, retirement, and survivors insurance benefits, determining continuing eligibility, maintaining claims and benefit accounts and related processing and accounting controls, and certifying benefit payments. As noted in paragraph 2 above, the Bureau of Disability Insurance in Baltimore has comparable responsibilities with respect to disability claims. The Social Security Administration Payment Centers (including the Bureau of Disability Insurance's Payment Center in Baltimore) have over 13,000 employees and have responsibility for the final adjudication and certification of benefits totaling over 31 billion dollars a year to approximately 27 million retirement, survivors and disability beneficiaries. 33 FR 5835, April 16, 1968.

32) The Reconsideration Branch in each of the six regional Payment Centers has responsibility for determining in retirement, survivors, and dependents claims, whether an overpayment has been made and whether waiver would be applicable. Where a disbility claim is involved, the Division of Continuing Entitlement and the Division of Benefit Payments in the Bureau of Disability Insurance's Payment Center determines whether an overpayment of disability benefits has been made; the waiver determination is made by the Bureau of Disability Payment Center's Division of Reconsideration. The various offices are composed of employees specially trained to handle the issues which arise in these types of cases. The Payment Centers maintain complete files of legal and administrative precedents dealing with these questions, so that each Payment Center has available to it the materials necessary for proper and expeditious adjudication.

33) In fiscal 1969, 3,195,515 claims for retirement, dependent, and survivors claims were processed. Of these, 2,951,780 claims were allowed initially and 243,735 were disallowed. There were 37,867 requests for reconsideration and of these 24,906 were allowed (mostly on the basis of newly submitted evidence) and 12,961 were again disallowed. There were 3,252 requests for hearing.

34) In fiscal 1971, 950,571 disability claims were processed. Of these, 393,464 were allowed initially and 557,107 were denied initially. There were 127,801 requests for reconsideration processed in disability cases, and of these claims 48,216 were allowed (mostly on the basis of newly submitted evidence) and 79,585 were again denied. There were 39,800 requests for a hearing in disability cases.

35) In 1969 there were 2,860,287 termination actions and approximately 320,444 suspension actions were taken in retirement, dependent and survivors cases. Excluding terminations for death, attainment of age 18, 22 or 65, withdrawal of application and entitlement to equal or larger benefits, the remaining terminations in 1969 were 515,189. In 1971 the Administration made 38,000 initial determinations that disability had ceased.

36) The Social Security Administration has made the following estimates with respect to overpayments:

(a) In 1970 there were overpayments in approximately 1,250,000 cases.

(b) Of these 1,250,000 overpayments there were requests for reconsideration in approximately 12,000 cases.

(c) Of the 12,000 reconsideration determinations with respect to overpayments there were approxi-

mately 8,250 reversals and approximately 3,750 affirmances.

(d) Of the 3,750 reconsideration affirmances with respect to overpayments there were requests for hearing in approximately 1,600 cases.

(e) Of the 1,600 cases that went to hearing with respect to overpayments there were reversals in approximately 560 cases and affirmances in 1,040 cases.

37) From July 1, 1970 through May 31, 1971 the total number of overpaid cases in the old-age, survivor's and disability insurance program where overpayments could not be waived and whose accounts were determined by the Administration to be uncollectable was 22,162. The total amount of money lost to the Retirement and Survivor's Trust Fund and to the Disability Trust Fund that year due to unrecovered overpayments was $5,784,039. The Social Security Administration estimates that less than half of erroneous overpayments are recovered.

/s/ Bernard Popick
BERNARD POPICK,
Director

Subscribed and sworn to before me
this 12th day of December 1972.

/s/ Dorothy H. Lamont
Notary Public

My Commission expires July 1, 1974

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 72-3629

EVELYN ELLIOTT *and* BENITO MOLINA, Individually and on behalf of all others similarly situated, PLAINTIFFS

v.

ELLIOTT L. RICHARDSON, Individually and in his capacity as Secretary, United States, Department of Health, Education, and Welfare; and SUNG DAI SEU, Individually and in his capacity as Pacific Area Manager, Social Security Administration, Department of Health, Education, and Welfare, DEFENDANTS

AFFIDAVIT OF BERNARD POPICK

BALTIMORE COUNTY)
) ss.
STATE OF MARYLAND)

I, Bernard Popick, being duly sworn, depose and say as follows:

I am the Director of the Bureau of Disability Insurance of the Social Security Administration, Department of Health, Education, and Welfare, which has the responsibility for the nationwide administration of the disability insurance program under Title II of the Social Security Act. The Bureau of Disability Insurance determines policies applicable to the administration of the disability program, reviews initial determinations of disability claims rendered by State Agencies in accordance with agreements entered into pursuant to 42 U.S.C. 421, and upon request by the claimant will undertake reconsideration determinations of disability claims which have been initially disallowed. Where a disability beneficiary or dependent entitled to benefits may have been overpaid, the Baltimore Disability Payment Center renders de-

terminations regarding overpayments in such cases and upon request of the beneficiary will determine whether recovery of an overpayment may be waived pursuant to section 204(b) of the Social Security Act, 42 U.S.C. 404(b).

In connection with my official duties I have custody of the claims folders of Raymond Gaines, Umeyuki Taniguchi, Hiroko Shimabukuro, Carl and Nancy Yamasaki and Lorraine Robinson, who have filed affidavits with the court on their behalf. My examination of their folders reveal the following:

I. *Raymond Gaines*

(1) Raymond Gaines, born January 6, 1910, initially filed an application on November 18, 1971, for retirement insurance benefits under section 202(a) of the Social Security Act, 42 U.S.C. 402(a). Such benefit entitlement was established for Mr. Gaines in the amount of $73.60 monthly effective January 1972 upon his attainment of age 62.

(2) Mr. Gaines thereafter filed an application for disability insurance benefits on February 25, 1972, alleging disability from June 6, 1971. On the basis of this application he was found entitled to a period of disability beginning September 15, 1971. Where a beneficiary becomes simultaneously entitled to disability benefits and retirement benefits, pursuant to section 202(k)(4) of the Act, 42 U.S.C. 402(k)(4), he may be paid only the larger of the two for any month. Accordingly, Mr. Gaines was awarded disability insurance benefits of $104.20 monthly effective April 1972 (following a six month waiting period after onset of disability pursuant to section 223(c)(2) of the Act, 42 U.S.C. 423(c)(2)). Mr. Gaines' disability monthly rate was increased to $125.40 effective September 1972 in accordance with legislative enactment.

(3) On November 14, 1972, Mr. Gaines' October 1972 disability benefit check payable on November 3, 1972, was returned on the basis of an incorrect address. To decrease the incidence of lost checks and to ensure that

checks are timely received as possible by proper beneficiaries, when a check is returned to the Administration as undeliverable, the centralized computer system of the Social Security Administration will automatically suspend benefit payments pending an investigation to ascertain the beneficiary's correct address. Because of the return of Mr. Gaines' October check, further payments were so suspended.

(4) Mr. Gaines contacted the Honolulu Social Security District Office inquiring of his check payable October 1972. In response to this inquiry, on December 18, 1972, action was taken to issue an "one check only" payment of $250.80 to Mr. Gaines in substitution of the checks payable in October and November 1972. This action was manually prepared by the Baltimore Disability Payment Center so that payment could be expedited and that check was sent to him at his correct address on December 22, 1972. By a manual procedure Mr. Gaines was also placed on a continuing pay status effective January 1973 and his December 1972 benefit was paid to him by a check issued on January 3, 1973.

(5) While the manual actions described in paragraph 4 above were being undertaken to respond to plaintiff's request that his benefit payments be resumed, on January 4, 1973 the Honolulu, Hawaii District Office submitted a change of address for the wage earner to the Baltimore Disability Payment Center which, by machine processing, automatically generated resumption of Mr. Gaines' previously suspended benefits and a check for $376.20 issued on January 9, 1973 representing benefits for October through December 1972. Because of such manual and automatic processing, Mr. Gaines received duplicate payments for October, November and December 1972 giving rise to an overpayment of $376.20.

(6) The "one check only" payment of $250.80, issued as a result of manual processing on December 18, 1972, was returned to the Administration by Mr. Gaines on February 6, 1973. Because it was not discerned at the Payment Center that a duplicate payment check was returned rather than a properly issued check being unde-

livered, a similar check was reissued by machine processing on February 8, 1973 to Mr. Gaines' current address. Consequently, no part of the overpayment was then recovered.

(7) On February 12, 1973, Mr. Gaines was notified by letter of the overpayment which had been caused by the duplicate payments. At that time he was also advised of the proposed recovery of this overpayment and advised that his future benefit payments would be adjusted to recoup the overpayment if he did not respond to the overpayment determination within 30 days. He was further advised of his right to seek reconsideration of the overpayment determination by filing a request therefor within 6 months, and of his right to receive consideration for waiver. This letter reads as follows:

> Our records show you received $376.20 more in social security benefits than you should have. You have received duplicate payments of $125.40 for October through December 1972.
>
> If you believe that this determination is not correct, you may request that your case be reexamined. If you want this reconsideration, you must request it not later than 6 months from the date of this notice. You may make any such request through any social security office. If additional evidence is available, you should submit it with your request.
>
> To recover the overpayment, we shall withhold your benefits beginning with the check you would normally receive in June 1973. The next check you will receive after the full overpayment has been withheld will be for $125.40. It will be sent to you about September 3, 1973. Thereafter, your regular monthly benefits of $125.40 will be resumed.
>
> Under social security law, any overpayment must be withheld from benefits or paid back unless *both* of the following are true:
>
> 1. The overpayment wasn't your fault in any way and you cashed the check(s) because you thought they were correct, *and*

> 2. You couldn't meet your necessary living expenses if you had to pay back the overpayment or have it withheld from your social security benefits; or it would be unfair for some other reason.
>
> To decide whether repayment would cause you financial hardship, we shall need a statement of your assets, and monthly income and expenses.
>
> If you think you meet *both* conditions or if withholding the entire amount of your monthly benefit will cause you financial hardship, call, write, or visit any social security office within 30 days from the receipt of this letter. Please take this letter with you if you visit the office. Unless we hear from you within 30 days, we shall withhold benefits as indicated above.

(8) Mr. Gaines has not yet responded to the letter of February 12, 1973, nor requested reconsideration or waiver and has not submitted additional evidence on his behalf. Under existing procedures Mr. Gaines' benefits are now subject to recoupment of the overpayment as indicated in the letter set out in paragraph 7. Because Mr. Gaines is now involved in this pending court action, Mr. Gaines has been continued in payment status with recoupment of the overpayment deferred.

II. *Umeyuki Taniguchi*

(1) With respect to an application filed May 29, 1968, entitlement to a period of disability was established for Umeyuki Taniguchi beginning April 18, 1968 due to cervical disc degeneration. He and his family (for whom applications were also filed) received monthly benefit payments of $307.20 effective November 1968 (following a six month waiting period after onset of disability pursuant to section 223(c)(2) of the Act, 42 U.S.C. 423(c)(2)). By legislative amendments the total monthly disability benefit level to Mr. Taniguchi and his family increased to $353.70 effective January 1970; increased to $389.20 effective January 1971; increased to $467.10 effective September 1972. The increased levels for Mr.

Tanigcuhi and his family have not yet been computed with respect to the Social Security Amendments of 1972 (P.L. 92-603).

(2) On February 12, 1970 Mr. Taniguchi reported to the Administration that beginning December 16, 1969 that he had been awarded temporary workmen's compensation, in connection with his disability, in the sum of $92.30 weekly ($92.30 x 4.33 = $399.77 monthly). Section 224 of the Social Security Act, 42 U.S.C. 424, requires that disability insurance benefits be reduced in accordance with the formulae contained therein on the basis of a beneficiary receiving workmen's compensation benefits. On March 30, 1970 disability benefit payments of $353.70 monthly to Mr. Taniguchi and his family were reduced to $71.40 monthly. Effective January 1971 the monthly disability benefit to Mr. Taniguchi and his family increased by $35.50 by legislative enactment raising the total payable to $106.90 monthly.

(3) On September 8, 1972, the Fireman's Fund American Insurance Company reported to the Social Security Administration that Mr. Taniguchi had been awarded a final workmen's compensation settlement of $25,000 effective June 23, 1972.

(4) On October 24, 1972 Mr. Taniguchi and his family were sent letters advising that their benefits had not been properly adjusted since July 1969 in light of Mr. Taniguchi having received workmen's compensation payments of $92.31 weekly since that time, and which was increased to $103.71 weekly effective July 1972. Upon revision of social security benefit rates payable since July 1969 with respect to Mr. Taniguchi's receipt of workmen's compensation since that time, they had been found to have been overpaid a total of $572.20 (Mr. Taniguchi $49.00 and his wife and two children $174.40 each). They were further advised at that time that an adjustment was made for the correct monthly benefit amount to be made payable. Recovery of the overpayment which had occurred would begin with the check that would otherwise be payable in February 1973. Mr. Taniguchi and his family were further advised of their appeal

rights of reconsideration, waiver, and a 30 day period within which to respond and submit evidence so that benefits would not be withheld for recoupment (Exhibits A and B).

(5) On December 4, 1972 Mr. Taniguchi furnished a statement to the Honolulu Social Security District Office saying: "If I must repay this overpayment ($572.20) please withhold only $50 a month total from our total benefits. I need the balance of our family payments to live on."

(6) A further review of Mr. Taniguchi's claims folder in February 1973 revealed that an incorrect computation of his 1962 earnings was made which resulted in an accrued underpayment since July 1969 totalling $1,542.40.

(7) On March 5, 1973 Mr. Taniguchi was advised by letter of the underpayment and that he would be sent a check for $1,542.40 shortly. Revised social security benefit rates payable in light of such error were also furnished with regard to which the underpayment was arrived at. Mr. Taniguchi was advised as follows: "Due to a processing error, the amount of social security benefits withheld due to your receipt of workmen's compensation was incorrectly figured. You are due $102.40 for July through December 1969, $124.80 for January through December 1970, $142.00 for January 1971 through August 1972, and $179.70 for September 1972 on. Based on this determination, you are no longer overpaid."

III. *Hiroko Shimabukuro*

(1) With respect to an application filed on June 19, 1963, entitlement to a period of disability was established for the wage earner, Roy Shimabukuro, on October 18, 1962 due to blindness. The wage earner, wage earner's wife Hiroko, and five children, Rick H., Norene R., Gary R., Mile T., and Rory S., (with respect to applications filed on their behalf) all became entitled to benefits also effective May 1963 (following a six month waiting period after onset of disability pursuant to section 223(c)(2) of the Act, 42 U.S.C. 423(c)(2).

(2) In April 1965 Rick H. Shimabukuro's benefits were terminated because of attainment of age 18. In August 1969 Gary R. Shimabukuro's benefits were terminated because he ceased to be a full-time student. Mike T. Shimabukuro's benefits terminated in May 1971 because of attainment of age 18. Norene R. Shimabukuro ceased to be eligible for benefits in June 1971 when she attained age 22. Child's benefits are terminated on the basis of such post-entitlement events pursuant to section 202(d) of the Act, 42 U.S.C. 402(d).

(3) In September 1972 Mrs. Shimabukuro inquired of the Social Security Administration whether she should be receiving her full monthly benefit in view of her work activities and earnings in 1971. From May 1971 when less than three dependents of the wage earner had been receiving benefits it was ascertained that work deductions could be imposable thereafter.[1] On the basis of Mrs. Shimabukuro presenting information of current work activity, she was placed in current suspension status effective October 1972.

(4) At the request of the Honolulu Social Security District Office, Mrs. Shimabukuro submitted annual reports of work activity for 1970 and 1971 on which she informed of earnings for 1970 in the amount of $5,702.21 in 1970 and $6,341.24 in 1971; earnings for 1972 were estimated to be $6,500. On the basis of these reports it was ascertained that Hiroko Shimabukuro had been overpaid $709.10 in 1971 and was incorrectly paid $859.30 for the period January 1972 through September 1972.

(5) On November 27, 1972 Mrs. Shimabukuro was advised by letter explaining the nature of the overpayment as follows:

[1] In most cases where there are less than three entitled dependents, total family benefits would not exceed and then be reduced to the family maximum payable on the wage earner's earnings record in accordance with section 203(a) of the Act, 42 U.S.C. 403(a). In such cases where more than two dependents are entitled to benefits and the total family amount is reduced to the family maximum payable by reduction to each dependent, other dependent beneficiaries' benefits on the wage earner's earnings record may be increased for a month where one dependent beneficiary has work deductions thus keeping the family maximum payable intact.

> Due to the termination of benefits payable to Mike in May 1971, the provisions of the Social Security Act under which you were receiving your full monthly benefit while working and earning over $140.00 each month no longer apply. You are entitled to receive a partial [amount] of $25.40 for May 1971.
>
> Due to the termination of benefits payable to Norene effective June 1971, you are no longer entitled to receive any benefits for any month you earn over $140.00. Since you received $93.40 for June 1971 through August 1972 and $112.10 for September 1972, you have been over paid $709.10 for 1971 and incorrectly paid $859.30 for January 1972 through September 1972.
>
> Final adjustment for 1972 will be made when we receive your 1972 annual report.

Since Mrs. Shimabukuro was put in current suspension status in light of present work activity, the notice did not advise of recoupment of any of the overpayment or seek refund which was to await Mrs. Shimabukuro's 1972 annual report to be filed on or before April 15, 1973. Because no recoupment action or refund was proposed, no determination had been issued with respect to which she would have rights of appeal and waiver.

(6) Mrs. Shimabukuro's entitlement to mother's insurance benefits terminated effective February 1973, pursuant to section 202(b) of the Act, 42 U.S.C. 402(b), upon her youngest child Rory attaining age 18 and no longer being entitled to child's insurance benefits.

(7) On February 9, 1973 Mrs. Shimabukuro completed a "refund" and a "without fault" questionnaire in connection with a request that the overpayment be waived. She stated that she was totally unaware that any overpayment was being created because she had been receiving benefits when she began working without deductions being imposed against her benefits. She inquired of the Administration regarding continuing receipt of benefits while working after discussing payments with a friend in similar circumstances who did not receive such pay-

ments. Additionally, she furnished information pertaining to her income and expenses.

(8) On April 7, 1973, with respect to Mrs. Shimabukuro's request for waiver on grounds that she was without fault in giving rise to the overpayment and that recovery would cause hardship, Mrs. Shimabukuro was informed that the incorrect social security payments of $1,568.40 were not required to be refunded.

IV. *Carl and Nancy Yamasaki*

(1) Carl Yamasaki, the wage earner, applied for disability insurance benefits on October 16, 1968, alleging disability from June 15, 1966, at age 24, due to a back injury. Disability was established with an onset date of June 15, 1966. The wage earner and dependents, his wife Nancy and his child Stacy (with respect to applications filed on their behalf) were found entitled to benefits beginning in October 1967, 12 months retroactive to the month in which the application was filed (the earliest month for which benefits could be paid in accordance with section 223(b) of the Act, 42 U.S.C. 423(b)).

(2) Mr. Yamasaki also was awarded workmen's compensation payments in connection with his disability, receiving payments totalling $19,460.72 for 253 weeks of total disability for the period June 1966 to May 1971; $6,631.59 in permanent partial disability payments beginning in August 1971 ($76.92 weekly); and a $2,050.00 lump sum award for disfigurement.

(3) Section 224 of the Social Security Act, 42 U.S.C. 424, requires that disability benefits be reduced in accordance with the formulae contained therein on the basis of a beneficiary receiving workmen's compensation benefits. With respect to such provision, Mr. Yamasaki's disability benefit was reduced to $29.70 monthly effective February 1972 and that of his wife and child $10.60 monthly each. Because of a processing error of the Social Security Administration, Nancy Yamasaki received $40.30 monthly from February 1972 through August 1972 and was thus overpaid $207.90 during that period.

Payments to Mr. Yamasaki and his child were correctly made and they have not been overpaid.

(4) On October 2, 1972, Nancy Yamasaki was advised by letter that she had received an overpayment of $207.90. She was informed of her right to request reconsideration within 6 months and of her right to request consideration of waiver of the overpayment and the applicable conditions which must be met before waiver would apply. She was also informed that withholding of the overpayment would begin unless she contacted the Social Security Administration within 30 days (Exhibit C).

(5) The records of the Social Security Administration do not reveal that Mrs. Yamasaki responded to the letter of October 2, 1972 within 30 days as advised therein to request reconsideration or consideration for waiver. On November 10, 1972 the Honolulu District Office, in an apparent response to an inquiry by the wage earner requesting information concerning the amount of the overpayment, requested that the Bureau of Disability Insurance furnish an explanation of the benefits paid to the family from March 1972 to the present. On December 6, 1972 the Bureau of Disability Insurance informed the District Office that incorrect payments to Mrs. Yamasaki had been made of $29.70 for months February through August 1972.

(6) Because no request for reconsideration or consideration for waiver had been made within the 30 day period as advised in the notice of October 2, 1972, Mrs. Yamasaki was further notified by letter of January 8, 1973 of withholding of her benefit payments of $20 monthly for December 1972 through September 1973 as recoupment of the overpayment (Exhibit D).

(7) On January 11, 1973, the Honolulu District Office was advised by the insurance carrier which paid Mr. Yamasaki workmen's compensation payments that such payments terminated on May 1, 1972, rather than in August 1972 as previously reported. Full social security benefit payments without reduction with respect to workmen's compensation payments could then be made to Mr.

Yamasaki and his family for months May through August 1972.

(8) On March 12, 1973, Mr. and Mrs. Yamasaki were notified that they and their child had become entitled to full benefit payments effective May 1972. They were advised a check would issue shortly in the amount of $1,324.60 and that their total monthly benefit payment would be $290.60 thereafter ($169.40 to the wage earner, and $60.60 each to his wife and child). Mr. and Mrs. Yamasaki were advised of the increased benefit amounts as follows:

> "Your benefits have been increased to $141.10 for May through August 1972, $169.40 for September 1972 through February 1973. Your wife's and child's benefits have been increased to $50.50 each for May through August 1972 and $60.60 each for September 1972 through February 1973. We have paid you the difference of what was paid and what is now payable. Your child will receive a check shortly in the amount of $399.00 which represents benefits May 1972 through February 1973; thereafter, $60.60 will be sent monthly. Due to the increase, your wife's overpayment has been adjusted."

(9) On April 16, 1973 a further communication was sent to Mrs. Yamasaki as follows: "Due to an error in processing, Stacy's monthly benefit for March 1973 was paid at the old rate. We are expediting additional benefits for March 1973 and you will receive a check shortly for $39.90. We are sorry for any inconvenience caused you.

We have also corrected the name and address on the check for you and your husband that will be paid on May 3, 1973."

Upon this action being taken, the wage earner and his family were all in payment status of their full and correct benefit amounts.

V. *Lorraine Robinson*

(1) The wage earner, Alexander Robinson, born February 28, 1918, filed an application for disability insurance benefits on September 21, 1971, and was determined to be disabled as of May 15, 1971 due to chronic pulmonary disease. He and his wife (with respect to an application filed on her behalf) also became entitled to benefit payments effective December 1971 (following a six month waiting period after onset of disability pursuant to section 223(c)(2) of the Act, 42 U.S.C. 423 (c)(2)).

(2) On November 18, 1971 Mr. Robinson advised the Social Security Administration that he had a pending claim for workmen's compensation and stated: "I understand that if my workmen's compensation is awarded, I may have to reimburse the Social Security Administration my social security money. I agree to do so. I will notify you of my workmen's compensation decision when it is received."

(3) An award of entitlement to disability insurance benefits to Mr. Robinson was established on July 27, 1972 effective December 1971 in the amount of $165.50 monthly, and a check to Mr. Alexander issued in August 1972 in the amount of $1,324 for the months December 1971 through July 1972.

(4) In response to a request of the Bureau of Disability Insurance on August 28, 1972, the insurance carrier advised that Mr. Robinson had been awarded temporary total workmen's compensation payments of $112.50 weekly or $112.50 x 4.33 = $487.50 monthly) for an indefinite period effective May 22, 1972. Section 224 of the Social Security Act, 42 U.S.C. 424, requires that benefits be reduced in accordance with the formulae contained therein on the basis of a beneficiary receiving workmen's compensation payments. On October 22, 1972, Mr. Robinson was advised by letter of an overpayment of disability of $662.00 because of receipt of workmen's compensation payments from June through September 1972 resulting in his benefits of $165.50 being reduced to zero for those months (he was, however, entitled to

the amount of the legislative increase in 1972 of $33.10 to his base benefit rate effective with the month September 1972). The notice of Mr. Robinson on October 22, 1972 further advised of appeal rights to reconsideration, waiver and a 30 day period within which to respond and submit evidence so that benefits would not be adjusted for recoupment (Exhibit E).

(5) Entitlement to benefits for Mrs. Lorraine Robinson on Mr. Robinson's earnings record was established for the first time on October 16, 1972 and the offset to her benefits resulting from her husband receiving workmen's compensation payments was applied prior to any payments having been made to her. For the period December 1971 through May 1972 her benefit rate was $82.80 monthly and this was reduced to zero for the period June 1972 through August 1972. Effective September 1972 she could realize a legislative increase to her base benefit rate in the amount of $16.50 monthly.

(6) On November 9, 1972, Mrs. Robinson was advised of the initial payment to her in the amount of $529 representing benefits of $82.80 for months December 1971 through May 1972 and $16.50 for months September 1972 and October 1972 (Exhibit F). With respect to such entitlement no suspension or actions have been made to benefit amounts upon payments being instituted, nor has Mrs. Robinson been found to have been overpaid.

/s/ Bernard Popick
BERNARD POPICK, Director
Bureau of Disability Insurance
Social Security Administration

Subscribed and sworn to before me
this 2nd day of May 1973.

/s/ Mary A. Brennan
MARY A. BRENNAN
Notary Public

My Commission expires June 30, 1974.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 72-3629

EVELYN ELLIOTT and BENITO MOLINA, Individually and on behalf of all others similarly situated, PLAINTIFFS

v.

ELLIOT L. RICHARDSON, Individually and in his capacity as Secretary, United States, Department of Health, Education, and Welfare; and SUNG DAI SEU, Individually and in his capacity as Pacific Area Manager, Social Security Administration, Department of Health, Education, and Welfare, DEFENDANTS

AFFIDAVIT OF JAMES E. FORBUS

BALTIMORE COUNTY)
) ss
STATE OF MARYLAND)

I, James E. Forbus, being duly sworn, depose and say as follows:

I am the Deputy Director of the Bureau of Retirement and Survivors Insurance of the Social Security Administration, and as such, am responsible for the formulation of policies and procedures whereby retirement, dependent and survivors' claims and related policies as affect disability claims under Title II of the Social Security Act are adjudicated. As Deputy Director of the Bureau of Retirement and Survivors Insurance, I am responsible also for the supervision of the Payment Centers of the Social Security Administration in their adjudication of Title II claims.

In connection with my official duties I have custody of the claims folders of Jordan A. Silva, Isabelle Ortiz, and John V. Vaquilar who have filed affidavits with the court on their behalf. My examination of their folders reveal the following:

I. *Jordan A. Silva*

(1) Jordan A. Silva filed an application for retirement benefits on November 6, 1963 and was awarded benefits in the amount of $64 monthly effective February 1964 when he became age 62. Periodically benefit levels have been increased by legislative enactment and are also recomputed periodically when a beneficiary has additional earnings posted to his earnings record. Mr. Silva's present monthly benefit is $155.30. Mr. Silva had worked and had earnings during the years 1964 through 1967 and his benefits during such years were adjusted with respect to earnings in excess of statutory levels contained in sections 203(b) and (f) of the Act, 42 U.S.C. 403(b) and (f).

(2) A present overpayment to Mr. Silva obtains with respect to benefits paid for years 1969 through 1971.

Mr. Silva filed an annual report on March 13, 1969 of earnings for 1968 indicating total earnings in that year of $2,241.70 and that he earned over $140 per month in all months; his statement of estimate of earnings for 1969 was $1,680 ($1,680 was the maximum exempt amount of earnings for which no deductions were imposed against benefits). Since Mr. Silva had not previously filed a report of work during 1968 and was accordingly paid all benefit amounts in that year, he was overpaid $280 for 1968. That overpayment was adjusted against benefits that would be payable to him in 1969. Because he stated he would have no excess earnings for 1969, all other benefits payable during that year were paid to him.

(3) Mr. Silva did not timely file an end of year annual report in 1970 (on or before April 15, 1970) disclosing his actual earnings in 1969. (Because he did not indicate excess earnings for 1969 in his prior estimate, benefits were not currently suspended with respect thereto and a report form was not mailed to him as it would have if he had properly estimated his earnings and been put in a current suspension status). At the request of the Social Security Administration, Mr. Silva filed an annual report for 1969 on October 22, 1970 disclosing total earnings of $2,805.35 for 1969, giving rise to an overpayment of $562 for that year; a penalty of $85.90 was also assessed because of his failure to file an annual

report timely. In the annual report of earnings for 1969 filed on October 22, 1970 Mr. Silva also estimated his earnings for 1970 to be $2,805, and revealed that he was working in October 1970; accordingly, benefits which were paid for October 1970 were not correctly due and he was overpaid $101.20 for that month. Mr. Silva was notified of the overpayments and penalty assessment on November 27, 1970, that benefits were withheld beginning November 1970 to recoup such amounts owed, and he was therein advised of rights to reconsideration and consideration for waiver.

(4) Mr. Silva filed a timely end of year report of earnings for 1970 on February 18, 1971, revealing total earnings of $3,989.26 instead of $2,805 as he noted in the October 1970 report. He therefore was overpaid $1,012 for 1970. About this time the Honolulu District Office coordinated with Mr. Silva's banker employer who indicated that he worked out a budget for Mr. Silva and suggested that no more than $10 be withheld from Mr. Silva's future benefits—otherwise Mr. Silva would again have to continue working in 1971 at a level of excess earnings. Mr. Silva's monthly benefits were thereupon reinstated beginning April 1971 with an amount of $10 withheld for recoupment purposes.

(5) Mr. Silva did not timely file an end of year annual report of earnings for 1971 (on or before April 15, 1972) disclosing his actual earnings in 1971. At the request of the Social Security Administration, he submitted such report on September 5, 1972 revealing total earnings of $3,713.11 for 1971. Because he previously estimated that he would not have excessive earnings in 1971 and all benefits due were paid, he was overpaid $1,433 for that year. He also stated on his report for 1971 an estimate of earnings of $3,000 for 1972, and this also indicated he was presently overpaid for 1972. Mr. Silva stated thereon: "I was not aware that I had to file any report." Benefit payments were suspended effective November 3, 1972 with the benefit for October 1972. Mr. Silva was advised by notice on October 2, 1972 of overpayments for 1971 and 1972 based on his report of earnings (the amounts of the overpayments advised of

are incorrect because in the machine processing, his monthly benefit amount paid was considered a full benefit whereas he in effect received $10 more which was applied toward recoupment of past overpayments). That notice did not refer to overpayments prior to 1971. Mr. Silva was advised of his rights to reconsideration and waiver (Exhibit A).

(6) At the request of the Social Security Administration, Mr. Silva timely filed an end of year annual report of earnings for 1972 on March 13, 1973 in which he stated only his 1972 earnings to be "about $3,000"; information obtained, with the plaintiff's permission, from his employer revealed his earnings to be $3,527.26 in 1972. Because Mr. Silva's benefits in 1972 were suspended for adjustment of past overpayments, he had not been overpaid for 1972.

(7) An assessment of Mr. Silva's account reveals

(a) an outstanding overpayment for 1969 of $562 plus $85.90 penalty

(b) outstanding overpayment of $1012 for 1970

(c) an overpayment of $1433 for 1971 which has been reduced to a current outstanding amount of $508.10 upon withholding benefit increases to Mr. Silva and benefit payments to his wife on his earnings record for whom wife's benefits became payable in May 1971, plus $154.40 penalty for failing to file a timely report for 1971 earnings.

(d) underpayment of $36.60 for 1972.

(e) total outstanding overpayment comes to $2045.50 plus total penalties of $240.30.

(8) Mr. Silva will be further advised of these matters and will be afforded opportunity for reconsideration and consideration of waiver.

II. *Isabelle Ortez*

(1) Isabelle Ortez filed an application for retirement benefits on October 16, 1970 and entitlement to benefits

was established effective September 1970 when she became age 65. She stated on her application that she was working full time for the Armed Forces and expected to have earnings in excess of $140 monthly during the next three months and estimated her earnings for 1971 to be $3,720. She also agreed to file an annual report of earnings for each year in which she was under age 72.

(2) Mrs. Ortez was put in deduction status from September through December 1970 with respect to her monthly benefit amount of $70.40, and continued in deduction status. An award notice issued on November 5, 1970 (Exhibit B) and she was furnished therewith a booklet of Rights and Responsibilities of Beneficiaries (Exhibit C).

(3) On April 27, 1971 the Honolulu Social Security District Office received and processed a work notice from Mrs. Ortez advising that she decreased her work activity to wages of not more than $140 per month beginning June 1971 and estimated her total earnings for 1971 to be $2,500. On the basis of this information, benefits were paid beginning with the payment for June 1971 and she was notified on May 27, 1971 of such payments being instituted. She was further advised that if she did not stop work as planned, she should notify any social security office and that final adjustments in her benefit payments would be made when she filed her annual report of earnings (Exhibit D).

(4) Mrs. Ortez filed an end of year annual report of earnings in January 1972 for 1971 revealing total earnings of $4,316.03 for that year and that she had wages in excess of $140 monthly in all months of 1971 giving rise to an overpayment of $492.80. Mrs. Ortez was notified on February 8, 1972 of the overpayment and adjustment action to be undertaken with respect to subsequent benefit payments and that benefit payments would be resumed in October 1972. She also was advised of her right to reconsideration and consideration of waiver (Exhibit E).

(5) The adjustment action against Mrs. Ortez' benefit payments has been completed as indicated in the notice of February 8, 1972 and benefit payments were resumed

with the payment for September 1972 payable on October 3, 1972. Since that time she has been in full payment status.

III. *John V. Vaquilar*

(1) John V. Vaquilar filed an application for retirement benefits on November 1, 1966 and entitlement to benefits was established effective June 1966, the month he attained age 63.

(2) On March 9, 1967, Mr. Vaquilar filed a timely annual report of earnings for 1966 revealing no excess earnings for that year and did not furnish an estimate of earnings for 1967, therefore he was continued in payment status without suspension.

(3) Mr. Vaquilar did not submit a timely annual report of earnings for 1967 (on or before April 15, 1968). At the request of the Social Security Administration he submitted such a report on September 30, 1968, revealing earnings of $2,828.20 and thereby giving rise to an overpayment of $441 for 1967; he again failed to furnish an estimate of earnings for 1968. He was assessed a penalty of a month's benefit amount for failing to file a timely annual report for 1967. Mr. Vaquilar was advised of the overpayment determination and penalty on December 11, 1968 and an adjustment action was undertaken with respect to his benefits for the 1967 overpayments.

(4) Mr. Vaquilar filed an amended annual report for 1967 on March 27, 1969 advising of total earnings of $2,822.20 for that year and no work activity during the period January 1967 through July 1967. Revisions to the adjustment action were made with respect to the amended report for 1967.

(5) On March 27, 1969, Mr. Vaquilar timely filed an annual report of earnings for 1968 revealing earnings of $7,395 for that year, advising that he did not work in December 1968, and estimating also that he would earn $5,000 in 1969. On the basis of this information he was found to have been overpaid $744.20 for 1968. On May 8, 1969 Mr. Vaquilar was notified of this overpayment and of a revised overpayment of $367.50 attributable to 1967 based on his revised report for 1967. A refund was requested for the total overpayment of $1,111.70. Mr. Vaquilar was put in a deduction status with respect to 1969 earnings.

(6) Mr. Vaquilar filed an annual report on September 24, 1971 for earnings in 1969 (because he did not receive any payments in 1969 this was not subject to the time limitation requirements for filing). He advised of earnings of $7,243 in 1969, that he did not work in January 1969 and that he stopped work effective October 1971. On the basis of this information he was paid a monthly benefit of $106.30 for January 1969 and benefits of $157.30 each for October and November 1971; this was paid by a check in December 1971 in a combined amount of $408.90. Mr. Vaquilar was advised of this payment on December 16, 1971 and advised of rights to reconsideration and consideration for waiver.

(7) Mr. Vaquilar was also issued an erroneous check in December 1971 in the amount of $141.50. He was notified of the error on January 27, 1972 and that adjustment would be made against his benefit payment for February payable on March 3, 1972. He was also advised of rights to reconsideration and consideration for waiver therewith. The adjustment action was thereafter undertaken.

(8) On January 23, 1972 Mr. Vaquilar submitted an annual report of earnings for 1971 stating his earnings to be $6,598.12 and that he did not work during January 1971 through September 1971 (the converse of information contained in his report submitted on September 24, 1971). On the basis of this report Mr. Vaquilar was paid an additional $909.90 for 1971 and he was advised of such payment on March 8, 1972. The notice advised of rights to reconsideration and waiver (Exhibit F).

(9) In response to an inquiry from the Social Security Administration on April 14, 1972, Mr. Vaquilar submitted a statement on May 23, 1972 stating he had made a mistake on his annual report for 1971 and ad-

vised that he earned in excess of $140 monthly January through September 1971. He did not request reconsideration or waiver but asked for relief by partial adjustment as follows:

> "If you *must* withhold from my benefit check, then withhold $80 per month. But I am in need of *all* the benefit amount to help support me and wife and adopted daughter." (Emphasis original)

(10) On November 24, 1972, Mr. Vaquilar was advised that recovery of the overpayment would be made by partial adjustment by withholding $80 monthly from his benefit payment (Exhibit G).

(11) On December 19, 1972 Mr. Vaquilar, assisted by an attorney, contacted the Honolulu District Office and requested reconsideration and waiver consideration. On January 23, 1972 full benefits were reinstated in accordance with section 5503.5 of the Claims Manual (Exhibit H) of the Social Security Administration (operating guide for personnel of the Social Security Administration) and $80 withheld from Mr. Vaquilar's benefit for December 1972 was repaid. Mr. Vaquilar continued in a full payment status pending reconsideration of the overpayment determination and consideration for waiver. Upon conclusion of reconsideration on February 2, 1973, he was found to be overpaid $909.90 for January 1971 through September 1971 because of work and earnings in 1971 and that waiver of recovery could not be granted since Mr. Vaquilar was found not to be without fault in creating the overpayment. Because of his financial circumstances it was further determined that partial adjustment would be undertaken by withholding $40 from his full monthly benefit amount of $201.60 effective with the benefit for February 1973 payable March 3, 1973,

(Exhibit I). Mr. Vaquilar is presently in a payment status with such adjustment.

/s/ James E. Forbus
JAMES E. FORBUS
Deputy Director
Bureau of Retirement
and Survivors Insurance
Social Security Administration

Subscribed and sworn to before me
this 2nd day of May 1973.

/s/ Mary A. Brennan
MARY A. BRENNAN
Notary Public

My Commission expires June 30, 1974.

BUREAU OF RETIREMENT
AND SURVIVORS INSURANCE

REFER TO CLAIM NUMBER 575-12-9643A

DATE: 10/2/72

Jordan A. Silva
3366 Keanu Street
Honolulu, Hawaii 96816

THIS REFERS TO YOUR ANNUAL REPORT OF EARNINGS FOR 1971 AND YOUR WORK REPORT FOR 1972

WHAT YOU REPORTED

EARNINGS IN 1971	MONTHS IN 1971 IN WHICH YOU DID NOT EARN OVER $140 IN WAGES OR PERFORM SUBSTANTIAL SERVICES IN SELF-EMPLOYMENT												ESTIMATED EARNINGS FOR 1972	WORK STATUS AT TIME YOU MADE REPORT
	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC		
$ 3713	N	O	N	E									$ 3000	Working

THE STATUS OF YOUR CLAIM AS OF

	TOTAL BENEFITS WHICH SHOULD HAVE BEEN WITHHELD TO DATE	TOTAL BENEFITS ACTUALLY WITHHELD	AMOUNT NEEDED TO ADJUST YOUR CLAIM TO DATE	AMOUNT DUE YOU	REGULAR MONTHLY BENEFIT AMOUNT
1971	$ 1071.60	$ None	$ 1071.60	$ None	$
1972	$ 427.20	$ None	$ 427.20	$ None	$ 104.80

(1) A review of your report shows you received $1071.60 more than you should have for 1971. Your work and estimated earnings for 1972 require that we recover $427.20 in benefits already paid to you this year. To account for both years, we will withhold your monthly benefits beginning 10/72. After the total of $1499.20 has been withheld, you will be due part of your benefit for 12/73. A check for $73.20 will be sent to you shortly after 12/3/73. You will receive your regular payment amount each month after that. Your benefits can begin earlier if you repay the $1071.60 amount. You may do so by check or money order made payable to the Social Security Administration. Please put your claim number on the check or money order.

(2) The above payment amount may be reduced by any unpaid medical insurance premiums due, or increased by any premiums paid in advance at the time you are due your next payment.

If you have questions about your benefits, you may get in touch with any social security office. Most questions can be handled by telephone or mail. If you visit an office, however, please take this notice with you.

Paul W. Quandt

Paul W. Quandt
Director of Operations
Retirement and Survivors Insurance

EXHIBIT A
1 of 2

See The Reverse Side Of This Form

FORM SSA-L760 (12-71)

96-76

If you believe this determination is not correct, you may request that your claim be reexamined. If you want this reconsideration, you must request it not later than 6 months from the date of this notice. You may make your request through any social security office. If additional evidence is available, you should submit it with your request.

1. How Your Work and Earnings Affect Your Benefits

For taxable years ending after December 1972, if you earn $2,100 or less during the taxable year (usually January through December), nothing will be withheld from your benefits.

If you earn more than $2,100 in the year, for each $2 of earnings above $2,100, $1 will be withheld from your benefits.

However, regardless of total earnings in a year, benefits are payable for any month in which you neither earn wages of more than $175 nor perform substantial services in self-employment.

Benefits are also payable for all months in which you are 72 or older, regardless of the amount of your earnings in months after you reach 72.

2. Report Any Significant Change in Your Work and Earnings to Any Social Security Office

The amount of benefits payable to you for this taxable year has been determined on the basis of your work status at the time you made your annual report of earnings for last year and on the amount of earnings you expected for this year as shown on that report. You should report promptly to any social security office any change which will affect your payments, such as:

a. If you go to work while under age 72 and expect to earn over $2,100 in the year;

b. If you have previously reported that you expect to earn over $2,100 from work, but

(1) You stop work, or

(2) You do not earn over $175 for any month and you do not perform substantial services in self-employment, or

(3) You expect to earn substantially more or less than you previously indicated, for the year.

Prompt reports enable us to make adjustments to your benefit payments when you have income from work. Delayed reports make it necessary for us to withhold benefits during periods when you may not have income from work.

Any difference between the amount of benefits withheld based on your estimate of earnings and the amount that must be withheld on the basis of your actual earnings will be adjusted after the close of the year when you file your next annual report.

If you have any questions about reporting, you should get in touch with any social security office.

3. Information About Medical Insurance Premiums

a. When monthly social security benefits are being paid to you—

If your premiums are paid up-to-date, 1 month's premium will be withheld from your benefit check each month.

If you owe premiums for last year, the full amount owed will be withheld from your next check.

If you owe premiums only for this year, only 1 month's premium will be withheld from your next check and at the end of the year we will make an adjustment for other premiums owed.

Any excess premiums paid in advance will be refunded to you in a separate check.

b. When monthly social security benefits are not currently being paid to you—

If this is the first time your benefits are being withheld this year, you will be billed for any premiums you owe.

If your benefits were withheld earlier this year, we will not bill you now: At the end of the year, we will make an adjustment for any premiums due.

4. Information When You Have Been Overpaid

Under social security law, any overpayment must be withheld from benefits or paid back unless *both* of the following are true:

a. The overpayment wasn't your fault in any way and you cashed the check(s) because you thought they were correct, *and*

b. You couldn't meet your necessary living expenses if you had to pay back the overpayment or have it withheld from your social security benefits; or it would be unfair for some other reason.

To decide whether repayment would cause you financial hardship, we will need a statement of your assets, and monthly income and expenses. If you think you meet both conditions or you wish to repay the overpayment by installments or have it withheld from benefits at a reduced rate over a longer period, call, write, or visit any social security office.

(12-72)

BEST COPY AVAILABLE

SAN FRANCISCO, CALIFORNIA 94105

REFER TO CLAIM NUMBER

Rebekka L. Kwan
[illegible] Hong
Waipahu, HI

THIS REFERS TO YOUR ANNUAL REPORT OF EARNINGS FOR 1971 AND YOUR WORK REPORT FOR 1972

EARNINGS IN 1971	MONTHS IN 1971 IN WHICH YOU DID NOT EARN OVER $250 AND WERE NOT SUBSTANTIALLY SELF-EMPLOYED OR SUPERVISED	ESTIMATED EARNINGS FOR 1972	WORK STATUS AT TIME YOU MADE REPORT
[illegible]	[illegible]	[illegible]	[illegible]

THE STATUS OF YOUR CLAIM AS OF

	TOTAL BENEFITS WHICH AMOUNTS HAVE BEEN WITHHELD TO DATE	TOTAL BENEFITS ACTUALLY WITHHELD	AMOUNT CREDITED TO ACCOUNT YOUR CLAIM NUMBER TO DATE	AMOUNT DUE YOU	REGULAR MONTHLY BENEFIT AMOUNT
1971	$44.80	[illegible]	492.80	-	[illegible]
1972	[illegible]	[illegible]	[illegible]	[illegible]	

A review of your records shows you received $80 [illegible] due you [illegible] for 1971. This amount is [illegible] A check for $[illegible] is sent to you [illegible] receive your regular [illegible]

If you have questions about your benefits, you may get in touch with any social security office. Most questions can be handled by telephone or mail. If you visit an office, however, please take this notice with you.

EXHIBIT E
1 of 2

Paul W. Quande
Director of Operations
Retirement and Survivors Insurance

See The Reverse Side Of This Form

FORM SSA-L760 (12-71)

If you believe this determination is not correct, you may request that your claim be reexamined. If you want this reconsideration, you must request it not later than 6 months from the date of this notice. You may make your request through any social security office. If additional evidence is available, you should submit it with your request.

1. How Your Work and Earnings Affect Your Benefits

For taxable years ending after December 1972, if you earn $2,100 or less during the taxable year (usually January through December), nothing will be withheld from your benefits.

If you earn more than $2,100 in the year, for each $2 of earnings above $2,100, $1 will be withheld from your benefits.

However, regardless of total earnings in a year, benefits are payable for any month in which you neither earn wages of more than $175 nor perform substantial services in self-employment.

Benefits are also payable for all months in which you are 72 or older, regardless of the amount of your earnings in months after you reach 72.

2. Report Any Significant Change in Your Work and Earnings to Any Social Security Office

The amount of benefits payable to you for this taxable year has been determined on the basis of your work status at the time you made your annual report of earnings for last year and on the amount of earnings you expected for this year as shown on that report. You should report promptly to any social security office any change which will affect your payments, such as:

a. If you go to work while under age 72 and expect to earn over $2,100 in the year;

b. If you have previously reported that you expect to earn over $2,100 from work, but

(1) You stop work, or

(2) You do not earn over $175 for any month and you do not perform substantial services in self-employment, or

(3) You expect to earn substantially more or less than you previously indicated, for the year.

Prompt reports enable us to make adjustments to your benefit payments when you have income from work. Delayed reports make it necessary for us to withhold benefits during periods when you may not have income from work.

Any difference between the amount of benefits withheld based on your estimate of earnings and the amount that must be withheld on the basis of your actual earnings will be adjusted after the close of the year when you file your next annual report.

If you have any questions about reporting, you should get in touch with any social security office.

3. Information About Medical Insurance Premiums

a. When monthly social security benefits are being paid to you—

If your premiums are paid up-to-date, 1 month's premium will be withheld from your benefit check each month.

If you owe premiums for last year, the full amount owed will be withheld from your next check.

If you owe premiums only for this year, only 1 month's premium will be withheld from your next check and at the end of the year we will make an adjustment for other premiums owed.

Any excess premiums paid in advance will be refunded to you in a separate check.

b. When monthly social security benefits are not currently being paid to you—

If this is the first time your benefits are being withheld this year, you will be billed for any premiums you owe.

If your benefits were withheld earlier this year, we will not bill you now. At the end of the year, we will make an adjustment for any premiums due.

4. Information When You Have Been Overpaid

Under social security law, any overpayment must be withheld from benefits or paid back unless *both* of the following are true:

a. The overpayment wasn't your fault in any way and you cashed the check(s) because you thought they were correct, *and*

b. You couldn't meet your necessary living expenses if you had to pay back the overpayment or have it withheld from your social security benefits; or it would be unfair for some other reason.

To decide whether repayment would cause you financial hardship, we will need a statement of your assets, and monthly income and expenses. If you think you meet both conditions or you wish to repay the overpayment by installments or have it withheld from benefits at a reduced rate over a longer period, call, write, or visit any social security office.

(12-72)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

SOCIAL SECURITY ADMINISTRATION

PAYMENT CENTER

SAN FRANCISCO, CALIFORNIA 94105

BUREAU OF RETIREMENT
AND SURVIVORS INSURANCE

REFER TO CLAIM NUMBER 533-10-5091-A

DATE March 8, 1972

John V. Vaeifar
2511 Nihi St.
Honolulu, HI 96819

THIS REFERS TO YOUR ANNUAL REPORT OF EARNINGS FOR 1971 AND YOUR WORK REPORT FOR 1972

WHAT YOU REPORTED

EARNINGS IN 1971	MONTHS IN 1971 IN WHICH YOU DID NOT EARN OVER $140 IN WAGES OR PERFORM SUBSTANTIAL SERVICES IN SELF-EMPLOYMENT	ESTIMATED EARNINGS FOR 1972	WORK STATUS AT TIME YOU MADE REPORT
$ 6593	JAN FEB MAR APR MAY JUN JUL AUG SEPT OCT NOV DEC X X X		WAS WORKING

THE STATUS OF YOUR CLAIM AS OF

	TOTAL BENEFITS WHICH SHOULD HAVE BEEN WITHHELD TO DATE	TOTAL BENEFITS ACTUALLY WITHHELD	AMOUNT NEEDED TO ADJUST YOUR CLAIM TO DATE	AMOUNT DUE YOU	REGULAR MONTHLY BENEFIT AMOUNT
1971	453.90	1363.80		909.90	151.60
1972	NONE				

A review of your report shows you are due $909.90 in benefits for 1971. A check for that amount will be sent to you shortly. You will continue to receive your regular payment amount each month.

If you have questions about your benefits, you may get in touch with any social security office. Most questions can be handled by telephone or mail. If you visit an office, however, please take this notice with you.

Paul W. Quandt
Director of Operations
Retirement and Survivors Insurance

EXHIBIT F
1 of 2

See The Reverse Side Of This Form

FORM SSA-L766 (12-71)

101

If you believe this determination is not correct, you may request that your claim be reexamined. If you want this reconsideration, you must request it not later than 6 months from the date of this notice. You may make your request through any social security office. If additional evidence is available, you should submit it with your request.

1. How Your Work and Earnings Affect Your Benefits

For taxable years ending after December 1972, if you earn $2,100 or less during the taxable year (usually January through December), nothing will be withheld from your benefits.

If you earn more than $2,100 in the year, for each $2 of earnings above $2,100, $1 will be withheld from your benefits.

However, regardless of total earnings in a year, benefits are payable for any month in which you neither earn wages of more than $175 nor perform substantial services in self-employment.

Benefits are also payable for all months in which you are 72 or older, regardless of the amount of your earnings in months after you reach 72.

2. Report Any Significant Change in Your Work and Earnings to Any Social Security Office

The amount of benefits payable to you for this taxable year has been determined on the basis of your work status at the time you made your annual report of earnings for last year and on the amount of earnings you expected for this year as shown on that report. You should report promptly to any social security office any change which will affect your payments, such as:

a. If you go to work while under age 72 and expect to earn over $2,100 in the year;

b. If you have previously reported that you expect to earn over $2,100 from work, but

(1) You stop work, or

(2) You do not earn over $175 for any month and you do not perform substantial services in self-employment, or

(3) You expect to earn substantially more or less than you previously indicated, for the year.

Prompt reports enable us to make adjustments to your benefit payments when you have income from work. Delayed reports make it necessary for us to withhold benefits during periods when you may not have income from work.

Any difference between the amount of benefits withheld based on your estimate of earnings and the amount that must be withheld on the basis of your actual earnings will be adjusted after the close of the year when you file your next annual report.

If you have any questions about reporting, you should get in touch with any social security office.

3. Information About Medical Insurance Premiums

a. When monthly social security benefits are being paid to you—

If your premiums are paid up-to-date, 1 month's premium will be withheld from your benefit check each month.

If you owe premiums for last year, the full amount owed will be withheld from your next check.

If you owe premiums only for this year, only 1 month's premium will be withheld from your next check and at the end of the year we will make an adjustment for other premiums owed.

Any excess premiums paid in advance will be refunded to you in a separate check.

b. When monthly social security benefits are not currently being paid to you—

If this is the first time your benefits are being withheld this year, you will be billed for any premiums you owe.

If your benefits were withheld earlier this year, we will not bill you now. At the end of the year, we will make an adjustment for any premiums due.

4. Information When You Have Been Overpaid

Under social security law, any overpayment must be withheld from benefits or paid back unless *both* of the following are true:

a. The overpayment wasn't your fault in any way and you cashed the check(s) because you thought they were correct, *and*

b. You couldn't meet your necessary living expenses if you had to pay back the overpayment or have it withheld from your social security benefits; *or* it would be unfair for some other reason.

To decide whether repayment would cause you financial hardship, we will need a statement of your assets, and monthly income and expenses. If you think you meet both conditions or you wish to repay the overpayment by installments or have it withheld from benefits at a reduced rate over a longer period, call, write, or visit any social security office.

(12-72)

SOCIAL SECURITY ADMINISTRATION

[illegible] CALIFORNIA 9[illegible]

[illegible]

533-23-5394-A November 21, 1972

[illegible] Y. Tagupa
[illegible] Hospital Co.
[illegible]
Honolulu, HI 96813

You will be pleased to know that your benefits are being started again for the month shown below.

1. AMOUNT OF YOUR NEXT CHECK	2. COVERED BENEFITS DUE THROUGH	3. WILL BE SENT ABOUT	4. AMOUNT OF REGULAR CHECK THEREAFTER
$ 115.80	November 1972	December 3, 1972	$ 115.80

We are withholding $80 from your benefits beginning November 1972 through September 1973 to recover your overpayment. This is in accordance with your request.

Please notify any social security office promptly of an event which might affect the payment of benefits. There is an explanation on the back of this letter of how work and earnings affect benefit payments.

If you have questions about your claim, you may get in touch with any social security office. Most questions can be handled by telephone or mail. If you visit an office, however, please take this letter with you.

Sincerely yours,

Paul W. Quandt

Paul W. Quandt
Director of Operations

SEE THE REVERSE SIDE OF THIS LETTER

SSA-L761 (4-71)

EXHIBIT C
1 of 2

If you believe this determination is not correct, you may request that your claim be reexamined. If you want this reconsideration, you must request it not later than 6 months from the date of this notice. You may make your request through any social security office. If additional evidence is available, you should submit it with your request.

1. How Your Work and Earnings Affect Your Benefits

For taxable years ending after December 1972, if you earn $2,100 or less during the taxable year (usually January through December), nothing will be withheld from your benefits.

If you earn more than $2,100 in the year, for each $2 of earnings above $2,100, $1 will be withheld from your benefits.

However, regardless of total earnings in a year, benefits are payable for any month in which you neither earn wages of more than $175 nor perform substantial services in self-employment.

Benefits are also payable for all months in which you are 72 or older, regardless of the amount of your earnings in months after you reach 72.

2. Report Any Significant Change in Your Work and Earnings to Any Social Security Office

The amount of benefits payable to you for this taxable year has been determined on the basis of your work status at the time you made your annual report of earnings for last year and on the amount of earnings you expected for this year as shown on that report. You should report promptly to any social security office any change which will affect your payments, such as:

a. If you go to work while under age 72 and expect to earn over $2,100 in the year;

b. If you have previously reported that you expect to earn over $2,100 from work, but

(1) You stop work, or

(2) You do not earn over $175 for any month and you do not perform substantial services in self-employment, or

(3) You expect to earn substantially more or less than you previously indicated for the year.

Prompt reports enable us to make adjustments to your benefit payments when you have income from work. Delayed reports make it necessary for us to withhold benefits during periods when you may not have income from work.

Any difference between the amount of benefits withheld based on your estimate of earnings and the amount that must be withheld on the basis of your actual earnings will be adjusted after the close of the year when you file your next annual report.

If you have any questions about reporting, you should get in touch with any social security office.

3. Information About Medical Insurance Premiums

a. When monthly social security benefits are being paid to you—

If your premiums are paid up-to-date, 1 month's premium will be withheld from your benefit check each month.

If you owe premiums for last year, the full amount owed will be withheld from your next check.

If you owe premiums only for this year, only 1 month's premium will be withheld from your next check and at the end of the year we will make an adjustment for other premiums owed.

Any excess premiums paid in advance will be refunded to you in a separate check.

b. When monthly social security benefits are not currently being paid to you—

If this is the first time your benefits are being withheld this year, you will be billed for any premiums you owe.

If your benefits were withheld earlier this year, we will not bill you now. At the end of the year, we will make an adjustment for any premiums due.

4. Information When You Have Been Overpaid

Under social security law, any overpayment must be withheld from benefits or paid back unless *both* of the following are true:

a. The overpayment wasn't your fault in any way and you cashed the check(s) because you thought they were correct, *and*

b. You couldn't meet your necessary living expenses if you had to pay back the overpayment or have it withheld from your social security benefits; or it would be unfair for some other reason.

To decide whether repayment would cause you financial hardship, we will need a statement of your assets, and monthly income and expenses. If you think you meet both conditions or you wish to repay the overpayment by installments or have it withheld from benefits at a reduced rate over a longer period, call, write, or visit any social security office.

(12-72)

EXHIBIT I

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

535-15-5-494-A

February 2, 1973

Mr. John V. Vaquilar
Apartment G
1421 Alapai
Honolulu, Hawaii 96813

Dear Mr. Vaquilar:

This refers to your overpayment of $309.90 for January 1971 through September 1971 because of your work and earnings in 1971.

Under social security law, any overpayment must be withheld from benefits or paid back unless *both* of the following are true:

1. The overpayment was not your fault in any way and you cashed the checks because you thought they were correct, *and*
2. You could not meet your necessary living expenses if you had to pay back the overpayment or have it withheld from your social security benefits; or is would be unfair for some other reason.

We have carefully considered all evidence of record and the information which you submitted regarding your reasons for accepting the incorrect payment. We find that you may not be relieved of the responsibility for repayment of the overpaid amount. You were fully advised of the deduction provisions when you filed for benefits November 1, 1966. You filed timely annual reports for such succeeding years. Moreover, on January 23, 1972, you submitted an erroneous annual report, indicating you did work January 1971 through September 1971. The annual report was processed and a check for $909.90

was released to you. The notice you received indicated the amount of $909.90 was due you based on your work report for 1971. Since you knew your non-work months in 1971 were only October 1971 through December 1971, and you had already been paid for those months, you should have questioned the excessive amount being paid as additional benefits for 1971. (No mention was made of prior years.) You had contacted the district office on previous occasions relative to benefits being paid to you.

In view of the foregoing, it [4 lines illegible]

If you believe that this determination is not correct, you may request that your case be reexamined. If you want this reexamination, you must request it not later than 6 months from the date of this notice. You may make any such request through any social security office. If additional evidence is available, you should submit it with your request.

It has been determined that the partial withholding of $40 per month will be used until the full recovery is made.

It has been determined that the partial withholding of $40 per month will be used until the full recovery is made.

Sincerely yours,

PAUL W. QUANDT
Director of Operations

cc:
Giles:rjd
Reading File
RSI:RR:SF:OCR:VV

EXHIBIT D

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
Baltimore, Maryland 21241

BUREAU OF DISABILITY INSURANCE

January 8, 1973

Refer to: 576-38-2979 HB2

Nancy T. Yamasaki
1351 Aala St Apt 201
Honolulu HI 96817

Your next social security check for $19.80 will be sent to you shortly after November 3, 1973. This check represents benefits due through October 1973. After that, your check for $20.70 will be sent to you regularly each month.

As you have been previously advised, we are withholding your benefits of $20.00 for December 1972 through September 1973 and part of October 1973 to recover the $207.90 overpayment made to you for February 1972 through August 1972. Effective October 1973 you will receive $19.80 and $20.70 effective November 1973 on.

Please notify your social security office promptly of any event which might affect your benefits.

If you have questions about your claim, you should get in touch with any social security office. Most questions can be handled by telephone or mail. If you visit the office, however, please take this letter with you.

Sincerely yours,

/s/ C. C. Hall
C. C. HALL
Assistant Director

1258/1-4-73/#2/

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil No. 72-3629

EVELYN ELLIOTT, ET AL., PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, ET AL., DEFENDANTS

AFFIDAVIT OF UMEYUKI TANIGUCHI

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

UMEYUKI TANIGUCHI, being first duly sworn on oath, deposes and says that:

1. I am married and reside at 45-1040 D Wailele Rd., Kaneohe, Hawaii.

2. In 1965, I received severe neck and back injuries (including a ruptured disk) in an industrial accident necessitating five separate operations to treat my injury.

3. Because of the severity of my condition, I began receiving Social Security disability benefits almost immediately.

4. In November 1972, I received a letter of notification that my next check (December) and all subsequent checks would have certain deductions in order to allow the Social Security Administration recoup the amount of benefits paid to me for a 1½ year period. I phoned the Honolulu branch office and was told that they wanted to recoup money paid to me during a period when I received some workmen's compensation benefits.

5. One week later, I visited the Honolulu branch of the Social Security office in an attempt to discover why I was forced to repay that money.

6. The first official of the Social Security Administration to whom I spoke refused to answer my many questions and finally threw the letter at me. I felt that I deserved answers to my questions and, then, spoke to a supervisor about my case and my treatment to date by the Social Security officials.

7. The supervisor gave me financial forms to complete and submit by December 7, 1972, to this office.

8. At no time have I felt that I owed the Social Security Administration any of this money.

9. I saw a notice in the newspaper advising me that the Legal Aid Society might be able to assist me with the Social Security Administration problem.

10. I spoke to Mr. Stanley E. Levin who advised me about other persons in situations similar to mine and I requested that his office help me.

11. I submitted necessary financial forms to the Honolulu branch on or about December 7, 1972 and furthermore I agreed to allow them to deduct $50 per month from my monthly check.

12. I was afraid that I would lose all of my social security benefits unless I agreed to repay the money.

13. If the Social Security officials had provided me with an opportunity for a hearing prior to their deciding I owed money, I would have used a hearing to prove that I did not owe any money.

14. I believe that only by such a procedure can a recipient's rights to subsistence funds be protected.

15. For the foregoing reasons, in response to a newspaper ad, I contacted the Legal Aid Society of Hawaii and have requested representation in this matter. I be-

lieve my situation is identical to other persons being represented by the Legal Aid Society.

Further affiant sayeth not.

/s/ Umeyuki Taniguchi
UMEYUKI TANIGUCHI

Subscribed and sworn to before me
this 9th day of January, 1973.

/s/ Georgianna G. Padayhag
GEORGIANNA G. PADAYHAG
Notary Public
First Judicial Circuit
State of Hawaii

My commission expires: 12-2-74.

EXHIBIT I

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil No. 72-3629

[Filed Jan. 30, 1973]

EVELYN ELLIOTT, ET AL., PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, ET AL., DEFENDANTS

AFFIDAVIT OF HIROKO SHIMABUKURO

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

HIROKO SHIMABUKURO, being first duly sworn on oath, deposes and says that:

1. I am married to Mr. Roy R. Shimabukuro and the mother of five children, and reside at 1246 Ala Napunani Street, Honolulu, Hawaii.

2. My husband was stricken with an eye disease in 1962 and as a result of the disease, he became permanently blind.

3. Because of my husband's disability, our family began receiving Social Security payments of approximately $300 per month; this figure changing due to the number of my children who remained at home. Originally, I received payments for all five of my minor children.

4. For quite some time I was completing the Annual Report forms as required by the Social Security Administration, but during the summer of 1972 the officials at the Honolulu branch told me that I would not be required to submit those forms any more because only

one of my children was unemancipated and living at home.

5. During the first week of December, 1972, I received a letter of notification from the Honolulu branch of the Social Security Administration stating that I owed them the sums of $709.00 and $800.00 for the years 1971 and 1972 respectively. (See Exhibits A & B attached hereto).

6. Enclosed with this notice were other forms for me to complete.

7. I contacted the Honolulu branch of the Social Security Administration to find out what was meant by this letter and I was told that the Social Security Administration had decided that I had been overpaid for those years. I was told that the overpayment was related to some of my children reaching the age of majority.

8. Due to my husband's total disability, I was forced to seek employment to augment our meager family income from the social security payments.

9. I have been employed by Shopping Basket, Inc. for the past ten years, and I began at a net salary of approximately $250 per month.

10. I do not believe that I owed the Social Security Administration the sums demanded as I was totally unaware of any overpayment during the months in question.

11. I believe that the Social Security Administration should not decide persons owe money or demand payment unless that person has had a prior opportunity to discuss the problem with those officials.

12. I would have used such a hearing to present my side and discuss my case, but no such opportunity was provided.

13. For the foregoing reasons, in response to a newspaper ad, I contacted the Legal Aid Society of Hawaii and have requested representation in this matter. I believe my situation is identical to other persons being represented by the Legal Aid Society.

Further affiant sayeth not.

/s/ Hiroko Shimabukuro
HIROKO SHIMABUKURO

Subscribed and sworn to before me
this 29th day of January, 1973.

/s/ Georgianna G. Padayhag
GEORGIANNA G. PADAYHAG
Notary Public
First Judicial Circuit
State of Hawaii

My commission expires: 12-2-74.

EXHIBIT "A"

DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE
SOCIAL SECURITY ADMINISTRATION
Baltimore, Maryland 21241

December 4, 1972

BUREAU OF DISABILITY INSURANCE

Refer to Claim Number:

576-01-8064 HB2

Hiroko Shimabukuro
1246 Ala Napunani St
Honolulu HI 96818

A review of your report of earnings for last year shows we should have withheld more social security benefits.

1. Reported earnings for last year—$6,341.24.
2. Total benefits withheld—$0.00.
3. Amount which should have been withheld—$709.10.
4. Amount you owe—$709.10.

You should send us the amount shown in item 4 by check or money order made out to the Social Security Administration. Please show your claim number as indicated above on the check or money order and mail it in the enclosed envelope.

Please see items 1 and 2 on the back of this letter for an explanation of how work and earnings affect benefit payments. Also, see item 3 on the back for overpayment information.

If you have questions about your claim, you may get in touch with any social security office. Most questions can

be handled by telephone or mail. If you visit an office, however, please take this letter wih you.

Sincerely yours,

/s/ C. C. Hall
C. C. HALL
Assistant Director

Enclosure
Envelope

EXHIBIT "B"

Due to the termination of benefits payable to Mike in May 1971, the provisions of the Social Security Act under which you were receiving your full monthly benefit while working and earning over $140.00 each month no longer apply. You are entitled to receive a partial [payment] of $25.40 for May 1971.

Due to the termination of benefits payable to Norene effective June 1971, you are no longer entitled to receive any benefits for any month you earn over $140.00. Since you received $93.40 for June 1971 through August 1972 and $112.10 for September 1972, you have been overpaid $709.10 for 1971 and incorrectly paid $859.30 for January 1972 through September 1972.

Final adjustment for 1972 will be made when we receive your 1972 annual report.

EXHIBIT J

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil No. 72-3629

[Filed Jan. 11, 1973]

EVELYN ELLIOTT, ET AL., PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, ET AL., DEFENDANTS

AFFIDAVIT OF LORRAINE ROBINSON

STATE OF HAWAII)
) ss.
CITY AND COUNTY OF HONOLULU)

LORRAINE ROBINSON, being first duly sworn on oath, deposes and says that:

1. I am married to Alexander P. Robinson, and we reside at 91-823 Liuliu Place, Ewa Beach, Hawaii.
2. I have been married previously and that husband passed away several years ago.
3. My daughter, 14 years of age, was born of that previous marriage.
4. Our family has been receiving benefits from the Social Security Administration for the total disability of my husband and for the survivors benefits payable to myself and my daughter.
5. My husband suffers from a severe condition of fibrosis of the lungs, in addition to severe heart complications, and is therefore totally disabled.
6. Initially, he applied for disability benefits in May 1970, and he began receiving payments in August 1971. At that time he received a check covering the period of his eligibility determinations.

7. In November 1972, my husband's regular monthly disability check of approximately $165 was unilaterally reduced to the amount of $33. Our family never received any prior written notification from the Social Security Administration of pendency of such action.

8. Immediately I phoned the Waipahu Branch of the Social Security Administration and demanded an explanation of this reduction. At that time, I was told that my husband's check was being reduced because they had knowledge that he would be receiving simultaneous workmen's compensation benefits. I was also told by these officials that my husband received the amount of $33 only because that amount represented the recent 20% increase in benefits. They stated that they did not believe they could recoup against that amount at this time.

9. On or about November 14, 1972, our family received a written notice that the Social Security Administration would reduce my husband's disability check even further in order to recoup another alleged overpayment ($600) and that this second recoupment would begin in March, 1973.

10. Subsequently, in November, 1972, my small check was reduced, without any prior notification to me. Upon phoning the Waipahu Branch for a second time, I was told that my reduction was due to alleged overpayments to my husband through his disability checks.

11. Neither I nor my husband was provided with any prior opportunity to contest the correctness of these decisions of the Social Security Administration.

12. I believe that if we had been afforded such an opportunity we would be receiving our regular benefits, not a drastically reduced version.

13. For the foregoing reasons, in response to a newspaper ad, I contacted the Legal Aid Society of Hawaii and have requested representation on this matter. I believe my siuation is identical to other persons being represented by the Legal Aid Society.

Further affiant sayeth not.

/s/ Lorrain E. Robinson
LORRAINE E. ROBINSON

Subscribed and sworn to before me
this 11th day of January, 1973.

/s/ Karen S. Jones
KAREN S. JONES
Notary Public
First Judicial Circuit
State of Hawaii

My commission expires: 9-7-74.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

Civil No. 72-3629

[Filed Apr. 3, 1973]

EVELYN ELLIOTT and BENITO MOLINA, Individually and on behalf of all other similarly situated, PLAINTIFFS

vs.

ELLIOT L. RICHARDSON, Individually and in his capacity as Secretary, United States Department of Health, Education and Welfare; and SUNG DAI SEU, Individually and in his capacity as Pacific Area Manager, Social Security Administration, Department of Health, Education and Welfare, DEFENDENTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on for hearing on February 20, 1973, upon Defendants' Motion for Extension of Time to Answer Plaintiffs' Interrogatories and Plaintiffs' Motion for Temporary Restraining Order or Alternatively for a Preliminary Injunction; the Plaintiffs represented by counsel, Peter A. Lee and Stanley E. Levin, Legal Aid Society of Hawaii; the Defendants represented by Robert Fukuda, U.S. Attorney for the District of Hawaii; evidence, both oral and documentary, was received, and arguments were heard. Whereupon this court, being fully advised in this matter, enters the following

FINDINGS OF FACT

1. On August 17, 1972, Evelyn Elliott and Benito Molina filed the above-entitled action for declaratory and injunctive relief against the named defendants.

2. This action sought a declaration that Title II Social Security Act, Section 204(a)(b), 42 U.S.C. § 404(a)(b), violates the Due Process Clause of the Fifth Amendment to the United States Constitution and permanent injunctive relief against said defendants.

3. The gravamen of the complaint was that the Social Security Administration does not provide a constitutionally adequate notice or hearing prior to the "adjustment," (i.e. reduction or termination) of a recipient's benefits.

4. Plaintiffs Elliott and Molina sought relief for themselves and all other persons similarly situated within the State of Hawaii.

5. Evelyn Elliott is a 64 year old cancer patient residing in Honolulu, Hawaii and receiving Social Security benefits.

6. Mrs. Elliott received full benefits of $156.00 per month until May, 1972, when she was informed by a hand-delivered letter from an official of the Social Security Administration, Honolulu District Office, that her benefits would be totally suspended from June to November 1972. No reasons were stated in the letter for said suspension other than a general statement that an overpayment had occurred. The letter failed to explain to Mrs. Elliott the forms and procedures available to her to assert her rights to reconsideration and waiver under the Social Security Administration regulations.

7. Because her Social Security benefits were her sole source of income, on June 27, 1972, Mrs. Elliott wrote to the Honolulu District Office explaining her financial difficulties, requesting an explanation for the suspension, and agreeing to receive a reduced monthly check of $50.00 in lieu of a full suspension of benefits.

8. Mrs. Elliott received no June, July, or August checks and was forced to obtain emergency welfare assistance from the State of Hawaii.

9. On August 3, 1972, Mrs. Elliott filed the requisite forms [1] with the Honolulu District Office.

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[1] Attached as Exhibits B, C, D, & E to the Verified Complaint filed herein.

10. During the week of August 7, 1972, Mrs. Elliott received a check of $442.00 from the Social Security Administration. This amount represented her June, July, August payments, less $50.00 per month withheld.

11. Mr. Benito Molina has lived and worked in Hawaii since 1921 when he emigrated from the Philippine Islands. In 1953, he became a United States citizen.

12. From 1962 until June, 1972, Mr. Molina has received social security old age benefits (OASDI). His benefits were terminated in June 1972 without any prior notice or opportunity for a pre-termination hearing.

13. In late May 1972, Mr. Molina responded to questions raised by officials at the Waipahu Branch Office concerning the possibility of conflicting claims to future survivors benefits.

14. Mr. Molina received no checks for June, July, and August. His main source of income is his monthly social security check of approximately $163.00.

15. Because his benefits were terminated, Mr. Molina was forced to obtain temporary welfare assistance of approximately $75.00 per month.

16. Shortly after the filing of this section, the Social Security Administration agreed to restore benefits to Mrs. Elliott and Mr. Molina at their pre-adjustment levels and to continue to pay them benefits pending final determination of the constitutional claims raised by their Verified Complaint.

17. On October 17, 1972, this Court, pursuant to Rule 23 of the Federal Rules of Civil Procedure, ordered this action be maintained as a class action; on November 20, 1972, this Court ordered notification to members of the class of the pendency of this action.[2]

18. Between January 9, 1973 and January 30, 1973, affidavits were filed on behalf of Carl Yamasaki, Nancy Yamasaki, Raymond Gaines, Lorraine Robinson, Isabelle Ortiz, Umeyuki Taniguchi, John V. Vaquilar, Jordan Silva and Hiroko Shimabukuro by attorneys for the Plaintiffs.

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[2] During the interim, at a hearing on October 26, 1972, both the Plaintiffs' Motion for Preliminary Injunction and Defendants' Motion for an Extension of Time to Answer were orally denied.

19. These affidavits, authenticated and entered into evidence as Plaintiffs' Exhibits *P-1/P-15* at the hearing herein establish that:

(a) While most of the Affiants received a written notice of downward adjustment (Yamasakis, Shimabukuro, Ortiz, Vaquilar, Silva, Taniguchi), others did not receive any prior notification, initially being made aware of an adjustment in benefits upon receipt of a reduced check. (i.e. affidavits of Mr. Gaines, Mrs. Robinson)

(b) Every Affiant who received written notice contacted the Social Security Administration within 30 days of receipt of the letter.

(c) Every Affiant, except Mrs. Shimabukuro, relied on the social security benefits as the primary means of support and consequently a downward adjustment of these benefits forced several of them to seek temporary welfare assistance. (For Mrs. Shimabukuro, the benefits constituted approximately 40% of her annual income.)

(d) Every Affiant had worked in the State of Hawaii for a substantial period to build up social security entitlements.

(e) At the time of the hearing on this matter, partial or total adjustments had been completed against Affiants Vaquilar ($909.90), Ortiz ($492.80); adjustments were in effect against Affiants Taniguchi ($50 per month initiated December, 1972 to repay approximately $700.00), Robinson ($132 per month initiated November, 1972, to recoup approximately $600); Gaines (termination of $125.00 monthly benefits to recoup approximately $900), and Yamasakis (termination of $20.70 statutory-disability share from January 1973 to October 1973 to recoup $207.90); Affiant Silva ($1374 overpayment claimed presently being recouped at a rate of $10.00); and an adjustment pending against Affiant Shimabukuro ($1568.40 claimed; exact date for recoupment not as yet established).

(f) Every Affiant who was informed of his rights of reconsideration and waiver, (i.e. Mrs. Shimabukuro, Mr. Yamasaki, Mr. Taniguchi) submitted the requisite forms to the Social Security Administration.

(g) Every Affiant who was never informed (by written or oral communication) of his rights to reconsideration and waiver, (i.e. Mrs. Ortiz, Mr. Vanquilar, Mrs. Robinson, Mr. Gaines) did not timely submit the requisite forms to the social security administration, but upon being informed, immediately filed said forms.

(h) Every Affiant believed that he or she did not owe the amount claimed by the Social Security Administration.

(i) In every case, the determination to adjust downward on Affiants' benefits involved questions of law and fact.[3]

(j) Each and every Affiant believed he or she was "without fault" in causing the alleged overpayments and that he or she could not afford to repay the amount claimed by the Social Security Administration.[4]

(k) None of the affiants was provided with any pre-adjustment oral hearing regarding determination of the correctness of the Social Security Administration's decision or the appropriateness of waiver being made.

(l) In the case of each and every Affiant, the Social Security Administration, during the period of disposition of the requests for waiver and reconsideration did not continue to pay a recipient his pre-adjustment benefits.

(m) Each and every Affiant would have utilized a pre-adjustment hearing if it had been made available to him.

20. Oral testimony of the Social Security officials at the hearing on February 20, 1973, and at earlier hearings, established that their procedure under the applicable regulations was that:

(a) A recipient, after being notified of a prospective downward adjustment, must contact the local Social Security office within 30 days to contest the correctness of the decision to adjust and the appropriateness of waiver of said adjustment;

(b) Once contacted, the Social Security personnel should answer any questions the recipient may have regarding the adjustment and if applicable will contest the correctness of the determination and/or seek waiver of the adjustment;

(c) The local social security office collects the Waiver (SSA632), without fault (HSA-631) and Reconsideration (SSA561) forms, and forwards these forms to the appropriate reviewing offices, i.e., Payment Centers throughout the United States;

(d) The district and branch offices transmit these forms for a determination by the Payment Center regarding the correctness of the substantive decision and the appropriateness of waiver in a given case;

(e) The district and branch offices do not possess the ultimate power for any decision making regarding a recipient's case, and consequently, these offices must await disposition by the reviewing office wherever situated (e.g. San Francisco, Kansas City, Baltimore.);

(f) The time period between submission of the waiver form and a decision regarding waiver is, as a practical matter delayed a minimum of 1 pay period and often as long as three payment periods;

(g) During the period of disposition of these requests, the Social Security Administration does not

[3] E.g. in Mrs. Shimabukuro's case, the Social Security Administration was seeking to recover alleged overpayments of approximately $1500 for the years 1971 and 1972 because, during that period, some of her children had reached the age of majority for benefit determination purposes.

[4] E.g. the Yamasakis were notified that due to a processing error of the Social Security Administration, an overpayment of $207.90 had occurred. Notwithstanding the Social Security Administration's admission that a processing error had occurred, Mrs. Yamasaki was requested to demonstrate that the overpayment was not her fault.

continue to pay a recipient his pre-adjustment benefits; the adjustment will be effectuated until a decision by the reviewing office reverses the initial and earlier determination to adjust;

(h) Provisions for "expedited" waiver decisions by the reviewing office are available but this procedure, as a practical matter, still results in an adjustment being made prior to review; in expedited cases adjustments will still go forward until reversed by the reviewing office.

CONCLUSIONS OF LAW

1. Pursuant to 28 U.S.C. § 1331, 1361, 1391 and Rule 65 of the Federal Rules of Civil Procedure, this court has jurisdiction to adjudicate Plaintiffs' constitutional claims and grant such other relief it deems necessary. Social Security benefits are statutory entitlements which are contributed by the recipient during his working years. Deductions are made at each pay period and constitute an individual's "insurance" for purposes of his or her future eligibility for social security payments of any type. *See* 42 U.S.C. § 402(a)(c).

2. Section 204(a), Title II Social Security Act, 42 U.S.C. § 404(a) provides that:

> Whenever an error has been made with respect to an individual under this title, proper adjustments shall be made, under regulations prescribed by the Secretary, by increasing or decreasing subsequent payments to which such individual is entitled.

3. Section 204(b), Title II Social Security Act, 42 U.S.C. § 404(b), provides that:

> There shall be no adjustment or recovery by the United States where incorrect payment has been made to an individual who is without fault, and when adjustment or recovery would defeat the purpose of this title or would be against equity and good conscience.

4. To implement these statutory mandates regarding the adjustment of benefits, the Social Security Administration has promulgated in its Claims Manual, the following provisions:

> Sec. 5503. *Summary of Procedures for Dealing With Overpayments*
>
> (a) Written Notice
>
> When it is determined that an incorrect payment has been made, the person liable should be notified in writing. The notice will inform the person of:
>
> (1) The incorrect payment made, how, and when it occurred.
>
> (2) The right to request reconsideration of the overpayment determination.
>
> (3) The required recovery.
>
> (4) The proposed adjustment or the demand for repayment where adjustment is not possible.
>
> (5) The waiver provisions of the law.
>
> (6) The availability of partial adjustment or partial refund.
>
> (7) The need to notify the DO promptly if he feels that the circumstances in his case would justify waiver, partial adjustment, or partial refund.
>
> • • • •
>
> (b) Delay in Withholding Benefits to Recover Overpayment
>
> Before we start to adjust the overpayment against the benefits due a beneficiary, he or his payee will normally be given reasonable opportunity to contest the correctness of the determination or to establish that a basis exists for waiver or partial adjustment. The notice to the beneficiary will advise him that adjustment will be deferred 30 days. However, actual adjustment may at the discretion of the reviewing office be extended to a longer period when the facts in a given case, including but not limited to time case is being worked, cut-off dates, mailing time, etc., indicate that a 30-day period would be inadequate for consideration of the matter and reply

by the beneficiary and reviewing office processing time.

The only exceptions to this rule are:

(1) the overpayment is based on a timely annual report by the beneficiary; or

(2) the overpayment results from the superendorsement procedures under Section 205(n) of the Act whereby payment of a combined check is made to the survivor. Under such circumstances, the surviving beneficiary is given advance notice of the adjustment action that will be taken to recoup the amount of the check which exceeds the amount to which the surviving individual is entitled in his own right. In the above two situations an immediate adjustment action is taken.

(c) Person Liable Protest

If the person responds raising some question about the correctness of the determination of overpayment, or raises a question about recovery, waiver or partial adjustment, the DO will obtain the necessary evidence and prepare a recommendation to the reviewing office for disposing of the case. Thus, if the person liable requests reconsideration of the substantive determination and it appears that the determination will be affirmed, the DO will develop the possibility of waiver of adjustment or recovery of the overpayment at the same time it receives evidence to resolve the request for reconsideration. This is necessary since, after the substantive determination is affirmed, the Reconsideration Determination will cover both issues (Sec. 8737).

Where reconsideration of the overpayment determination, waiver, or partial adjustment development is initiated, withholding to recoup the overpayment will be further deferred and payment will be continued until development has been completed, if the beneficiary is otherwise entitled to benefits. If development will not be completed before the expiration of the 30 day period, the DO will utilize teletype to advise the reviewing office.

Where action has already been taken to recoup an overpayment, i.e., § (b)(1) or (b)(2) above, or where the beneficiary did not respond until after the deferral period, if the beneficiary requests either waiver, partial adjustment or reconsideration of the overpayment determination and benefits are otherwise payable, the DO will immediately notify the reviewing office to initiate payment of benefits effective with the current operating month until such time as the issue has been resolved.

5. "The fundamental requisite of due process of law is the opportunity to be heard", *Grannis* v. *Ordean*, 234 U.S. 385, 394 (1914), "at a meaningful time and in a meaningful manner," *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965). The circumstances in which due process clause requires an opportunity to be heard prior to detrimental government action "begin[s] with a determination of the precise nature of the government function involved as well as the private interest that has been affected by government action." *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961).

6. By its decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), the United States Supreme Court established that, in order to effectively protect welfare recipients' constitutional due process rights, state welfare agencies were required, as a constitutional minimum, to provide a recipient with *adequate advance notice* of a proposed termination of benefits and with an opportunity for a hearing *prior* to effectuating any termination. The function of that hearing would be "to produce an initial determinate of the validity of the . . . department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of benefits." 397 U.S. at 267. The Court held that the "brutal need" of the recipient's situation, i.e., depending on these benefits for daily subsistence, demanded this result.[1] Accord:

[1] Additionally, courts have mandated prior oral adversary hearings in the following situations: *Perry* v. *Sindermann*, 408 U.S. 593 (1972); [tenured teacher entitled to hearing prior to nonretention]; *Bell* v. *Burson*, 402 U.S. 535 (1971) [driver entitled to hearing prior

Wheeler v. *State of Vermont*, 335 F. Supp. 856 (D. Vt. 1972).

7. The facts of this case establish that the written letter sent by the Social Security Administration (*see* §§ 5508 Claims Manual for sample letters of adjustment) to the recipients does not provide them with constitutionally adequate notice. At best, if the notice is sent, it warns the recipients *generally*, that a downward adjustment *has been made*. The notice, as provided in § 5503 Claims Manual, does not provide sufficient information for the recipient to make an informed decision on how he can best proceed; and, by failing to provide complete information, tends to discourage further inquiry by the recipient. Moreover, the present notice fails to communicate to the recipient his right to come forward and complain about the pending adjustment, and the method he may utilize to enforce this right.

8. Due process requires at a minimum the Social Security recipient, like the welfare recipient, who depend on benefits for subsistence be informed in writing of:

> (a) the reasons for termination;
> (b) his right to request a pre-termination hearing;
> (c) the continuance of benefits until the prior hearing is held, and thereafter until notice of adjustment is mailed to recipient;
> (d) the method whereby a recipient may obtain a pre-termination hearing;
> (e) his right to a fair hearing;
> (f) his right to be represented by legal counsel both at the pre-termination and fair hearings;
> (g) his right to confront and cross-examine witnesses against him. *See Bell* v. *Burson*, 402 U.S. 535 (1971); *Goldberg* v. *Kelly*, *supra*; *Cafeteria & Restaurant Workers Union* v. *McElroy*, *supra*; *Green* v. *Elroy*, 360 U.S. 474, 496-97 (1959).

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to license revocational]; *Sniadach* v. *Family Finance*, 395 U.S. 337 (1967) [hearing prior to garnishment of wages]; *Cafeteria Workers* v. *McElroy*, *supra* [hearing prior to loss of public employment].

9. Additionally, due process requires that the social security recipients for whom benefits are the primary means of support are entitled to the same constitutional protection as the welfare recipient in *Goldberg*. The social security recipient who relies on his benefits as the primary means of support must be afforded the opportunity for a hearing prior to any adjustment of his benefits by the Social Security Administration. Under the existing regulations, § 5503(b)(c) Claims Manual, the recipient is not afforded the opportunity for even a minimal oral adversary hearing to test either the factual and legal correctness of the Social Security Administration determination or the question of his "brutal need", i.e. whether recoupment should be waived immediately. At present the recipient is caught in the administrative shift of decision-making from the local district office to the regional payment centers and consequently as a practical matter he receives no check for a substantial period (at least 2 or 3 pay periods).

10. The applicable regulations fail to provide the recipient with the type and quality of due process hearing mandated by *Goldberg* v. *Kelly*, *supra*. Under the Social Security Claims Manual, Section 5503(b)(c), the constitutional infirmities stem from the *ex parte* character, in theory and practice, of any and all determinations regarding the correctness of the substantive determination, and the feasibility of waiver.

The regulations provide:

> (b) *Delay in Withholding Benefits to Recover Overment*
>
> . . . The notice to the beneficiary will advise him that adjustment will be deferred 30 days. *However, actual adjustment may at the discretion of the reviewing office be extended to a longer period . . .*
>
> (c) *Person Liable Protests*
>
> If the person responds raising some questions about the correctness of the determination of

overpayment or raises a question about recovery . . . . *the (District Office) will obtain the necessary evidence and prepare a recommendation to the reviewing office for disposing of the case. Thus, a person liable requests reconsideration of the substantive determination and it appears that the determination will be affirmed, the (District office) will develop the possibility of waiver of adjustment . . . at the same time it receives evidence to resolve the request for reconsideration. This is necessary since if the substantive determination is affirmed the Reconsideration Determination will cover both issues.* (emphasis in original)

11. These regulations never provide a recipient with even a minimal due process hearing prior to an adjustment of his benefits.[2] Nowhere do the above-quoted Social Security regulations provide for the notification to the recipients of the kind of evidence which must be brought forward to contest a social security initial determination; the standard of proof to be applied; or the availability of an impartial decision-maker.

At best, the process established by the Social Security Administration approximates the procedures for written submission specifically rejected as a constitutionally adequate in *Goldberg*. As the Court held:

> Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision-maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision . . . . Therefore, a recipient must be allowed to state his *position orally* . . . .
>
> *In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.* 397 U.S. at 269 (citations omitted) (emphasis added)

[2] Due to the broad exception of Claims Manual §§ 5503(a) and (b)(1) and (2), recipients filing annual income reports and recipients who receive a combined survivors' benefit check are subject to ***immediate adjustment without deferral. These recipients are denied any semblance of due process protection.*** (Plaintiffs Shimabukuro, Silva, Vaquilar fall within the ambits of these broad exceptions.)

12. Additionally, while the social security regulations may suggest a procedure by which adjustments are deferred once the recipient challenges the correctness of the decision to adjust, the facts of this case indicate otherwise. The repeated and recurrent instances of aggrieved recipients establishes that these regulations allow for wide variances in enforcement and interpretation and are, therefore, constitutionally inadequate. It is a relatively simple matter for the social security administration to promulgate regulations which would not be subject to such uneven interpretation by its own employees.

13. It is clear, therefore, that minimal due process demands that the Social Security Administration provide a recipient with a convenient hearing prior to any downward adjustment of benefits at which the recipient may:

(a) confront and cross-examine any adverse witness;
(b) submit any evidence to establish all pertinent facts and circumstances in the case;
(c) question or refute any testimony or evidence;
(d) examine all documents and records to be used at the hearing at a reasonable time before the date of hearing, as well as during the hearing;
(e) present the case itself or have it presented by legal counsel or other person;
(f) present witnesses in his own behalf;
(g) be heard by an impartial decision-maker.

14. Moreover, it is also clear that the foregoing minimum due process safeguards must be afforded to all re-

cipients of Title II Social Security benefits who are also for constitutional purposes substantially aggrived (e.g. Mrs. Shimabukuro) not merely those recipients in "brutal need." *See Bell v. Burson, supra.*

15. This court therefore concludes that:

(a) Immediate and irreparable injury, loss, and damage have resulted and will result to Plaintiffs and their class before this matter can be decided on its merits;

(b) Defendants will not suffer undue injury as a result of this Order;

(c) Plaintiffs have raised serious and substantial statutory and constitutional questions on the validity of the procedure used by Defendants to adjust payments of OASDI benefits under Title II of the Social Security Act;

(d) There is a substantial likelihood that Plaintiffs and their class will prevail on the merits. *Schwartz* v. *Covington*, 341 F.2d 537 (9th Cir. 1965).

Order Accordingly.

Dated: Honolulu, Hawaii, April 3, 1973.

/s/ Samuel P. King
SAMUEL P. KING
Judge
United States District Court
of Hawaii

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 72-3629

[Filed Apr. 10, 1973]

EVELYN ELLIOTT, ET AL., PLAINTIFFS

vs.

CASPAR WEINBERGER, ET AL., DEFENDANTS

DEFENDANTS' ANSWERS TO PLAINTIFF'S INTERROGATORIES

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the within was duly mailed to Stanley Levin & Peter Lee, attorney at his last known address on April 10, 1973.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Civil No. 72-3629

EVELYN ELLIOTT, ET AL., PLAINTIFFS

v.

CASPAR WEINBERGER, ET AL., DEFENDANTS

DEFENDANTS' ANSWERS TO PLAINTIFFS' INTERROGATORIES

PRELIMINARY STATEMENT

A. The answers to the plaintiff's interrogatories are herewith furnished in good faith and based upon the best information available to the Social Security Administration.

Defendant has endeavored to be as responsive as possible in submitting answers to plaintiffs' interrogatories. Certain information requested herein is of a confidential nature and is precluded by law from disclosure. Where this obtains, the legal basis therefor is indicated. Statistics are also requested in certain questions which have not been compiled by the Social Security Administration and are thus not available. Such information can only be obtained by a statistical study which could only be undertaken over a long period of time and at great expense and utilization of much personnel resources. Such costs are not expended unless the information obtained would be of significant value of Title II program objectives. Where statistics relevant to the information sought are available they have been furnished in answer to the interrogatory.

B. For purposes of answering these interrogatories, the term "old-age" benefits is defined as meaning retirement and survivors insurance benefits under Title II of the Act. This definition is necessary since statistics requested

by plaintiff are maintained by beneficiary categories, and there is a beneficiary category (child's benefits) common to both retirement and survivor's benefits.

Plaintiff's Preliminary Statement

In these interrogatories, the term "new procedures" is used to refer to the procedures for recouping overpayments described in 20 C.F.R. §§ 404.502(a), 404.907 and Social Security Administration Claims Manual §§ 5500 *et seq.*

INTERROGATORY #1:

When were the new procedures promulgated?

A. On January 14, 1971, the Commissioner of Social Security approved a policy whereby in any case where Title II Social Security benefits are withheld to recover an overpayment the beneficiary must be advised (at the time he is notified of the Administration's action) of his right to request reconsideration by the Administration of the overpayment determination and of the provisions of the Social Security Act (42 U.S.C. 404(b)) governing waiver of recovery of overpayments. This policy was promulgated in the Social Security Regulations (20 C.F.R. sections 404.502(a) and 404.907 on May 25, 1972 (37 Fed. Register, May 25, 1972)). As described in answer to Interrogatory #3 below, the Administration's operating personnel were instructed to implement this portion of the new procedures in June 1971. The remainder of the new procedures are contained in Section 5503 of the Claims Manual of the Social Security Administration (operating guide for Administration personnel) as set forth in paragraphs 32-35 of Mr. Hugh F. McKenna's affidavit in the case of the plaintiff Molina, and paragraphs 24-26 of Mr. Bernard Popick's affidavit in the case of the plaintiff Elliot.

INTERROGATORY #2:

Have the new procedures been put into effect?

A. Yes.

INTERROGATORY #3:

What was the effective date of the new procedures:

a. as to disability benefits recipients;
b. as to survivors benefits recipients;
c. as to old age benefits recipients.

A. Those portions of the new procedures described above which are contained in 20 C.F.R. 404.502(a),404.907 and Section 5503 of the Claims Manual of the Social Security Administration were put into effect as to *all* social security beneficiaries in the summer of 1971. They were at that time incorporated into the Social Security Claims Manual as Temporary Instructions T5500 and T5502 transmitted to all components by Transmittal Sheet No. 2593 dated June 1, 1971, and were distributed by mail to all Social Security Administration offices on or about June 15, 1971. Allowing time for delivery and reading by the staff responsible for effectuating such procedures in the actual processing of claims, it is estimated that this portion of the "new procedures" were fully effectuated by July 1, 1971. The remainder of the new procedures which apply to *all* beneficiaries are contained in Section 5503 of the Claims Manual and were transmitted to all components of the Social Security Administration with Transmittal Sheet No. 2743 dated March 22, 1972, by mailing about 2 weeks later. Allowing time for delivery and reading by the staff responsible for effectuating such procedures in the processing of claims, it is estimated that the new procedures were effectuated in all offices of the Administration by April 15, 1972.

INTERROGATORY #4:

If the answer to Interrogatory #2 is in the affirmative state in detail.

a. What specific instructions and training were given to personnel administering the new procedures in the payment centers?

A. All instructions implementing the new procedures are contained in the Claims Manual sections referred to

in answer to Interrogatory #3. These instructions were accompanied at the time of their issuance by Transmittal Sheets 2593 and 2743, respectively.

b. What specific instructions and training were given to personnel administering the new procedures in the District and Branch offices?

A. Same as (a), above.

c. When were these instructions referred to in subsections a and b distributed? Be specific as to dates.

A. Refer to answer to Interrogatory #3.

d. Identify with sufficient particularity to permit a motion for the production thereof all forms, books, pamphlets and other papers used in instructions and training personnel to administer the new procedures.

A. See answer to e below.

e. Will you supply these papers without a motion to produce? If so, please attach the answer to these interrogatories.

A. Section 5503 *et seq.* of the Claims Manual containing instructional guidelines, as set forth in Mr. McKenna's affidavits (answer to Interrogatory #1), may be examined and copies thereof obtained at any Social Security District Office. Transmittal Sheets Nos. 2593 and 2743 effecting changes in Section 5503 are attached hereto as Exhibits 1 and 2. Commissioner's Bulletin No. 117 dated August 2, 1971, is attached hereto as Exhibit 3.

INTERROGATORY #5:

If the answer to Interrogatory #2 is in the negative or if Interrogatory #3 is not appropriate, state in detail.

a. how are the new procedures being implemented at the current time?

b. to what extent are the new procedures not being implemented at the current time?

c. what steps has the Department taken to make certain that the new procedures will be implemented fully as to all Title II recipients?

A. Not applicable.

INTERROGATORY #6:

State the names and addresses of all persons residing in the State of Hawaii, whose Social Security Title II disability, survivors or old age benefits have been adjusted downward between March 1972 and January 1, 1973, pursuant to 42 U.S.C. § 404(a) in order to recoup alleged overpayments. If it is not possible to give this information for the State of Hawaii alone, please answer this question as to the smallest geographical unit which is convenient, i.e. Honolulu, Oahu, Western Hawaii.

A. The Secretary does not maintain geographical statistics and is unable to supply the information requested. The Secretary by law is prohibited from supplying the names and addresses of social security claimants who are not named as parties to this action. 42 U.S.C. 1306(a); Social Security Regulation No. 1, (20 C.F.R. 401).

INTERROGATORY #7:

State the names and addresses of the persons residing in the State of Hawaii whose Social Security Title II disability, survivors or old age benefits have been adjusted downward pursuant to 42 U.S.C. § 404(a) between March 1972 and January 1, 1973, in order to reduce or terminate their benefits under Title II. If it is not possible to give this information for State of Hawaii alone, please answer this question with reference to the same geographical unit which was used in answer in Interrogatory #6.

A. Refer to answer to Interrogatory #6.

INTERROGATORY #8:

State in detail how the new procedures would have been applied to Plaintiffs ELLIOTT and MOLINA if they had

been properly processed. Include which alternate procedures would have applied had they:

a. submitted a written response to the initial letter describing their complaints in general.

b. merely gone for an oral interview at their district office.

c. filed a formal request for reconsideration.

d. filed a formal request for waiver.

A. As demonstrated by paragraph 13 of Mr. McKenna's affidavit, and by page 4 of Defendant's Memorandum of Law, suspension of the plaintiff Molina's benefits were not authorized under either former or current procedures. There has been no overpayment determination in the plaintiff Molina's claim. Therefore if his case had been properly processed, his benefit payments would have been continued without any disturbance or notice of proposed administrative action.

Payments to Nicolasa Antonio, the plaintiff Molina's spouse (who is not a party to this suit) were erroneously stopped under former Claims Manual procedures as set forth in CM 5030, 5036, 5038, and 5040, Transmittal No. 2087, dated July 1968. (This administrative action was not undertaken in connection with an overpayment determination; no overpayment determination as to plaintiff's spouse had been made.) The former procedures enabled the district offices to request suspension of benefits pending further investigation of continued eligibility under certain conditions. Thus benefit payments were stopped not because of an overpayment determination but because it appeared that plaintiff's spouse was no longer entitled to benefits as his wife. (See Mr. McKenna's affidavit dated December 12, 1972, paragraph 13.) However, coexistent with these general instructions were specific instructions pertaining to the method of treating initial determinations in response to adverse claims from contesting parties as set forth in CM 7130 and 7134, transmittal number 2607 dated July 1971. Pursuant to those instructions the Administration was, as it is now,

required to contact the initial claimant, explain to him the potential effect of the contesting claim and afford him the opportunity to submit additional evidence to support his or her claim, *before benefit payments to the initial claimant were disturbed.* (Paragraph 31, Mr. McKenna's affidavit.)

Claims Manual transmittal number 2811 of June 1972 revised sections 5030, 5036, 5038, and 5040. The general policy for withholding benefits has been restated in CM 5030, currently in effect. (See Mr. McKenna's affidavit dated December 12, 1972, paragraphs 26-29). The procedure now in effect for terminating benefits as a result of an adverse claim is now prescribed in CM 7131. This procedure which replaces the former instructions in CM 7130 and 7134 has been in effect since August 1972 when it was issued under Claims Manual transmittal number 2841. The revised procedures provide for a 30 day advance notice in writing personally delivered during which the initial claimant may establish his right to payment and rebut the contesting claim. (See Mr. McKenna's affidavit dated December 12, 1972, paragraphs 30-31).

a. If the plaintiff had responded with a written submission which could have been construed as questioning the suspension, the Social Security Administration would have treated this communication as a request for reconsideration in accordance with the instructions in CM 7115 and 7117. In such an event plaintiff's benefits would have been reinstated immediately and he would have remained in current pay status until the reconsideration determination was completed.

b. If the plaintiff in an oral interview at the district office had questioned the determination that he had been suspended, district office personnel conducting the interview would have had the plaintiff file a formal request for reconsideration. Under these circumstances plaintiff's benefits would have also been reinstated immediately and he would have remained in current pay status until the reconsideration determination was completed.

c. See answer to (a), above.

d. Not applicable.

With respect to the plaintiff Elliott, as demonstrated by paragraphs 12 and 27 of Mr. Popick's affidavit and by page 2 of Defendant's Memorandum of Law, the new procedures for the recovery of overpayments, CM 5503, were complied with in every respect except that the plaintiff was not notified of the possibility of partial adjustment. The plaintiff received notice of the overpayment by personal delivery to her home on April 28, 1972, which was over 30 days before the Administration took action to recover the overpayment by withholding the plaintiff's disability benefits. The plaintiff was afforded the requisite advance notice of the Administration's proposed action and was advised of her right to reconsideration and to establish that she qualified for waiver, and was informed that she should contact the Administration within 30 days if she wished to question the Administration's proposed action. However the plaintiff did not contact the Administration until almost a month after her benefit payments had been stopped. When she did contact the Administration, she did not request waiver or reconsideration. She instead stated that she wished to repay the overpayment by partial rather than full withholding of her benefits. The Administration effectuated this request 5 weeks later and restored to her all benefits which had been previously withheld which had exceeded the partial adjustment requested by plaintiff. (Mr. Popick's affidavit, paragraphs 20-21.)

a. If the plaintiff Elliot had responded with a written submission which could have been construed either as questioning the overpayment determination or as requesting waiver of the overpayment or both, the Social Security Administration would have treated this communication as a request for reconsideration and/or waiver. In accordance with Claims Manual 5503(c) the Social Security Administration would also have deferred the recoupment action pending a reconsideration and/or a waiver determination. As indicated in paragraph 26 of Mr. Popick's affidavit, if a claimant questions the correctness of the overpayment determination there will be both a reconsideration of the initial overpayment determi-

nation and an initial determination with respect to waiver. Although a formal request for reconsideration is the customary procedure in accordance with 20 C.F.R. 404.910, reconsideration will also be undertaken where the beneficiary submits a written statement from which such a request can be inferred as set out in CM 5503(c). If, as in the case of the plaintiff Elliott, the beneficiary's written response does not appear to question the overpayment determination or ask for waiver but does ask for partial adjustment, the Administration will then determine whether or not partial adjustment is warranted, as was done in this case.

b. If the plaintiff in an oral interview at the district office had questioned the determination that she was overpaid, district office personnel conducting the interview would have had the plaintiff file a formal request for reconsideration. Similarly, if in an oral interview the plaintiff had indicated that hardship and/or other reasons should excuse her from repaying the overpayment, district office personnel would have had the plaintiff file a formal request for waiver. Instructions to guide Social Security Administration personnel with respect to advising claimants of the administrative procedures are set out in CM 7108 *et seq.*, which may be examined and copies thereof obtained from a social security district office (CM 7404).

c. See answer to (a) above.

d. See answers to (a) and (b) above.

INTERROGATORY #9:

State in detail how the new procedures would have been applied to Plaintiffs CARL and NANCY YAMASAKI, SSAN 576-38-2979HA, 576-2979HB2, respectively, if they had been properly processed. Include which alternate procedures would have applied had they:

a. submitted a written response to the initial letter describing their complaints in general.

b. merely gone for an oral interview at their district office.

c. filed a formal request for reconsideration.

d. filed a formal request for waiver.

A. The above named individuals are not parties to the instant civil action. The Secretary has not been served with any pleadings relating to the above named individuals and is unaware of any court order allowing them to intervene in this action.

The Federal Rules of Civil Procedure restrict to use of discovery to matters relating "* * * to the claim or defense of the party seeking discovery or to the claim or defense of any other party * * *" Fed. R. Civ. P. 26(b). The use of interrogatories is restricted to matters within the purview of Rule 26(b) by Fed. R. Civ. P. 33(b). Since the above named individuals are not parties to this suit and since any information concerning their social security benefit status would not assist the named plaintiffs in the claim or defense of this action, the Secretary is not required to respond to this Interrogatory.

INTERROGATORY #10:

Identify with sufficient particularity to permit a motion for the production thereof, all forms, papers and letters which would be sent to Plaintiffs MOLINA and ELLIOTT if they were processed under the new procedures. Will you supply these papers without a motion to produce? If so, please attach to the answers to these interrogatories.

A. Samples of notices that are to be sent to beneficiaries at least 30 days in advance of a proposed overpayment determination and recoupment action may be found at Section 5508 of the Claims Manual, which may be examined and copies thereof obtained at a Social Security District Office. Such revised forms were incorporated in the Claims Manual on March 22, 1972, with Transmittal Sheet No. 2743 (Exhibit 2 attached hereto).

INTERROGATORY #11:

List the names of all persons processed through the San Francisco Payment Center in San Francisco, California

who were sent any notice of the Department's adjustment, or intent to adjust Title II benefits during the period.

a. from August 17, 1972 through and including September 1, 1972;

b. from October 9, 1972 through and including October 13, 1972;

c. from January 1, 1973 through and including January 10, 1973.

A. Refer to answer to Interrogatory #6.

INTERROGATORY #12:

List the names of all persons processed through the San Francisco Payment Center who were sent a notice as described in section 5503 of the Social Security Administration Claims Manual (hereinafter "Manual") during the period.

a. from August 17, 1972 through and including September 1, 1972.

b. from October 9, 1972 through and including October 13, 1972.

c. from January 1, 1973 through and including January 10, 1973.

A. Refer to answer to Interrogatory #6.

INTERROGATORY #13:

Attach a copy of the notice sent to each person named in answer to Interrogatories #13 and #14.

A. Not applicable.

INTERROGATORY #14:

List the names and attach a copy of any and all responses of claimants to the Notice described in Interrogatories #14 and #15, including but not limited to:

a. letters to the District Office and Branch Offices;

b. letters to the Payment Center;

c. Requests for reconsideration;

d. Requests for Waiver;

e. Any other written or oral response.

A. Refer to answer to Interrogatory #6.

INTERROGATORY #15:

For each person named in answer to Interrogatory #14 describe:

a. how long was recoupment or partial recoupment or adjustment delayed?

b. What action was taken by the Department on each response?

c. Identify with sufficient particularity to permit a motion for the production thereof, all forms, papers and letters which were sent to each person named in answer to Interrogatory #14.

d. Will you supply these papers without a motion to produce? If so, please attach to the answers to these interrogatories.

A. Not applicable.

INTERROGATORY #16:

List the names of all persons processed through the Bureau of Disability Insurance, Baltimore, Maryland, who were sent any Notice of the Department's adjustment or intent to adjust Title II benefits during the period:

a. From August 17, 1972 through and including September 1, 1972.

b. From October 9, 1972 through and including October 13, 1972.

c. From January 1, 1973 through and including January 10, 1973.

A. Refer to answer to Interrogatory #6.

INTERROGATORY #17:

List the names of all persons processed through the Bureau of Disability Insurance, Baltimore, Maryland, who were sent a notice as described in section 5503 of the Social Security Administration Claims Manual (hereinafter "Manual") during the period

a. From August 17, 1972 through and including September 1, 1972.

b. From October 9, 1972 through and including October 13, 1972.

c. From January 1, 1973 through and including January 10, 1973.

A. Refer to answer to Interrogatory #6.

INTERROGATORY #18:

Attach a copy of the notice sent to each person named in answer to Interrogatories #16 and #17.

A. Not applicable.

INTERROGATORY #19:

List the names and attach a copy of any and all responses of claimants to the Notice described in Interrogatories #16 and 17, including but not limited to:

a. letters to the District Office and Branch offices;

b. letters to the Payment Center:

c. Request for reconsideration;

d. Requests for Waiver;

A. Refer to answer to Interrogatory #6.

INTERROGATORY #20:

For each person named in answer to Interrogatory #19 describe:

a. How long was recoupment or partial recoupment delayed?

b. What action was taken by the Department on each response?

c. Identify with sufficient particularity to permit a motion for the production thereof, all forms, papers and letters which were sent to each person named in answer to Interrogatory #27.

A. Not applicable.

INTERROGATORY #21:

Identify with sufficient particularity to permit a motion for the production thereof, all forms, papers and letters used by the Department under the new procedures in informing recipients of the intent of the Department to adjust disability, survivors and old age grants to recoup an overpayment all forms, papers and letters used by the Department to evaluate and process responses to the intent to adjust.

a. For each form described above, state the date on such form was issued.

b. Will you supply these papers without a motion to produce? If so, please attach to the answers to these Interrogatories.

A. Refer to answer to Interrogatory #10.

INTERROGATORY #22:

The following questions refer to hearings held pursuant to 20 C.F.R. § 404.918 and request for hearings made after the Secretary's reconsidered determinations that individual persons had received overpayments of Title II benefits, in the calendar year 1971 and 1972:

a. What was the average time period between the mailing of the reconsideration determination and the receipt of a request for hearing, in the year 1971?

b. Repeat for 1972.

c. What was the average time period between the receipt of a request for a hearing and the hearing itself, in the year 1971?

d. What was the average time period between the receipt of a request for a hearing and the hearing itself, in the year 1972?

e. What was the average time period between the hearing and the decision in 1971?

f. What was the average time period between the hearing and the decision in 1972?

A. The Social Security Administration does not maintain statistics regarding questions a. and b. Section 404.918 of Social Security Regulations No. 4, 20 C.F.R. 404.918, provides that a claimant may file a request for a hearing following a reconsideration determination within 6 months of the date of the reconsideration determination and this may be extended for "good cause" in accordance with section 404.954 of the Regulations. With respect to questions c. through f. the following is furnished: For calendar year 1970, upon receipt of a reconsideration request (all pertinent issues including overpayment issues) the median time for additional evidentiary development to accord the claimant maximum consideration is 74 days and the median time for a reconsideration determination to be rendered thereafter is 20 days. Upon receipt of a request for a hearing by an administrative law judge, the median time for a decision to be rendered is 96 days (during which all pertinent issues were considered). Comparable statistics are not available for 1971 or 1972.

INTERROGATORY #23:

Since the time the new procedures were implemented how many persons have been sent letters which comply wih Manual section 5503?

A. The Social Security Administration does not compile statistics of this nature.

INTERROGATORY #24:

Of the number of persons listed in answer to Interrogatory 31, how many persons were mailed a 5503 letter by the reviewing office?

b. how many persons were personally delivered letters by the District office?

c. how many persons were mailed letters by the District office?

A. The Social Security Administration does not compile statistics of this nature. Section 5503 of the Claims Manual specifies the types of situations in which notices will personally be delivered to the beneficiary. Refer to answer to Interrogatory #1 for text:

INTERROGATORY #25:

Of the number of persons listed in answer to Interrogatory #23:

a. how many had the actual adjustment extended beyond the 30 day period specified in 5503(b)?

b. how many had the actual adjustment extended beyond the 60 days?

c. how many had the actual adjustment extended beyond the 90 days?

d. how many had the actual adjustment extended beyond the 120 days?

A. The Social Security Administration does not compile statistics of this nature.

INTERROGATORY #26:

Of the number of persons listed in answer to Interrogatory #31 (sic):

How many contested the correctness of the determination or tried to establish a ground for waiver by:

a. writing a letter to their local office;

b. writing a letter to their payment center;

c. filing a request for reconsideration;

d. filing a waiver form;

e. making oral contact with their local office.

A. The Social Security Administration does not compile statistics of this nature.

INTERROGATORY #27:

List the persons at each reviewing office throughout the country who exercise discretion in allowing the 30 day deferrment period referred to in 5503(b) to be extended. For each person list:

a. name;

b. title;

c. office;

d. address;

A. This step is a part of the adjudicative process and it may be undertaken in the performance of the official duties by Administration employees throughout the country who are authorized to perform adjudicative functions. The Secretary of Health, Education, and Welfare has responsibility for the actions taken by employees of the Department within the scope of their official duties.

INTERROGATORY #28:

How many hearings did the Department hold in overpayment cases:

a. in 1971;

b. in 1972;

c. from January 1, through January 10, 1973.

A. This information for calendar year 1971 and later is not yet available.

INTERROGATORY #29:

Explain in detail how the post-adjustment hearings work specifying the following information:

a. how many hearings examiners are there?

b. what other staff works on hearing?

c. where are hearings held?

d. how long does an average overpayment hearing last?

A. Evidentiary development in Title II cases is mostly undertaken at the initial and reconsideration levels of the administrative process using the facilities and resources of Social Security District Offices and Payment Centers. At these stages of the administrative process most cases are concluded since only in a relatively few number do claimants advance their cases to an administrative hearing. Even as to those cases in which a *de novo* hearing is held in accordance with section 205(b) of the Social Security Act, 42 U.S.C. 405(b), the evidentiary development previously undertaken in the case, to that extent, conserves the administrative law judge's time and thus enables a smaller number of administrative law judges to handle the total number of cases that go to hearings. In paragraph 36 of Mr. Popick's affidavit as to plaintiff Elliott it is indicated that in 1970 there were 1,250,000 overpayment cases, that 12,000 requests for reconsideration were filed in such cases and that about 1,600 requests for a hearing were filed in such cases. (Paragraph 33 of the affidavit indicates that while there were in excess of 3 million new claims for retirement, dependents, and survivor benefits filed in 1969,

about 3,200 hearings were held with respect to such claims.) Rather than holding only 1,600 hearings with respect to a caseload of about 1,250,000 as presently obtains, a requirement to hold a hearing prior to withholding of benefits in overpayment cases would, in that category alone, increase the number of hearings to in excess of 1,000,000. In addition to a commensurate increase of personnel, such an increase in number of hearings would also necessitate an increase of facilities within which to hold the hearings.

As of October 1972, there were approximately 375 administrative law judges who are usually assisted by a hearing assistant and secretarial staff to handle *all* of the SSA hearing caseload responsibilities (retirement, dependents, survivors, disability, health insurance, and black lung benefits) involving issues of initial entitlement as well as post-entitlement issues. Administrative law judges are assigned by the Bureau of Hearings and Appeals of the Social Security Administration to each of 10 Department of Health, Education, and Welfare regional offices to conduct hearings for claimants or beneficiaries who reside in the respective geographical region. Approximately, these are as follows:

Region I (Boston)—	12
Region II (New York)—	48
Region III (Philadelphia)—	42
Region IV (Atlanta)—	95
Region V (Chicago)—	42
Region VI (Dallas)—	47
Region VII (Kansas City, MO)—	20
Region VIII (Denver)—	6
Region IX (San Francisco)—	53
Region X (Seattle)—	9

Section 7161 of the Claims Manual of the Social Security Administration (available for examination at a

Social Security District Office) provides that hearings are to be conducted in the 50 states, District of Columbia, Puerto Rico, and Virgin Islands and that hearings will normally be held within 75 miles of the claimant's residence.

The length of time a hearing proceeding will take will depend on the nature of the case, complexity, and the extent to which witnesses are presented to testify. An average time for a hearing cannot be estimated although a hearing proceeding will normally be conducted within 4 hours, or one-half of a business day. In addition to conducting the hearing proceeding, administrative law judge's case assignments entail responsibilities for contacting parties and witnesses with respect to scheduling cases; undertaking additional evidentiary development not previously obtained: e.g., obtaining official records of Federal or State agencies, other documentation, consultative examinations, etc.; after the hearing evaluating the documentary evidence and testimony of record and then issuing a decision in the case.

INTERROGATORY #30:

List the total number of persons from whom overpayments were assessed and whose benefits were adjusted in the years listed below. If possible, give this information for the State of Hawaii alone; if not, please answer this question with reference to the same geographical unit which was used in answer to Interrogatory #6:

a. 1971;

b. 1972;

c. January 1, 1973 through January 10, 1973.

A. The Social Security Administration does not compile statistics delineated as presented by this question. Records of the Social Security Administration show the following number of beneficiaries whose overpayment was initially established in calendar year 1971 and (1) has an outstanding overpayment of at least $200 *or* (2) an overpayment cannot be fully satisfied within the calendar year in which it is determined to exist.

1971:	105,400	Retirement and survivors beneficiaries
	33,700	Disability beneficiaries
	139,100	Total

Statistics are not maintained for cases where the overpayment is less than $200 and is satisfied in the calendar year in which it is determined to exist.

Records of the Social Security Administration show that the following number of persons in the categories as described above, were affected by *actions described below* taken at all levels of the administrative process and in court cases in calendar year 1971 *regarding disposition of assessed overpayments* of retirement, survivors, and disability benefits:

Actions	Number of Cases in 1971
Refund by beneficiary	34,300
Adjusted against subsequent benefits	24,700
Waived	11,100

Similar information is not yet available for periods after 1971.

INTERROGATORY #31:

Of the persons listed in answer to Interrogatory 30, how many ceased to be entitled to benefits: (If possible, give this information for the State of Hawaii alone; if not, please answer this question with reference to the same geographical unit which was used in answer to Interrogatory #6)

a. due to death, in

1. 1971;
2. 1972;
3. to date in 1973.

b. cessation of disability:

1. 1971;
2. 1972;
3. to date in 1973.

c. attainment of a certain age:

1. 1971;
2. 1972;
3. to date in 1973.

d. marriage:

1. 1971;
2. 1972;
3. to date in 1973.

e. other reasons, specifying the reasons:

1. 1971;
2. 1972;
3. to date in 1973.

A. The Social Security Administration does not compile statistics with regard to the base for termination of benefit entitlement. Defendant's Memorandum of Law in Support of Secretary's Motion to Dismiss and/or Motion for Summary Judgment at page 18 endeavors to illustrate that a prior overpayment cannot be adjusted against future benefit payments where entitlement has been determined to cease because of the various factors as herein set forth since termination of entitlement terminates the right to future benefit payments. Entitlement to the various categories of benefits will terminate on the basis of these conditions subsequent as provided in Sections 202 (retirement, dependents, survivor benefits) and Section 223 (disability benefits) of the Act, 42 U.S.C. 402 and 423. Statistics as to overpayment categories are maintained by the Social Security Administration only as set out in answer to Interrogatory #30.

INTERROGATORY #32:

List the total number of persons from whose benefits were reduced or terminated, for purposes other than overpayment recoupment, in the years listed below. If possible, give this information for the State of Hawaii alone; if not, please answer this question with reference to the same geographical unit which was used in answer to Interrogatory #6:

a. 1971;
b. 1972;
c. January 1, 1973 through January 10, 1973.

A. The Social Security Administration does not maintain records according to the category requested.

INTERROGATORY #33:

Of the persons listed in answer to Interrogatory 32, how many ceased to be entitled to benefits: (If possible, give this information for the State of Hawaii alone; if not, please answer this question with reference to the same geographical unit which was used in answer to Interrogatory #6)

a. due to death, in

1. 1971;
2. 1972;
3. to date in 1973;

b. cessation of disability:

1. 1971;
2. 1972;
3. to date in 1973;

c. attainment of a certain age:

1. 1971;
2. 1972;
3. to date in 1973;

d. marriage:

1. 1971;
2. 1972;
3. to date in 1973.

A. The Social Security Administration does not compile statistics with regard to the bases for cessation of entitlement.

INTERROGATORY #34:

State the total number of persons who were allegedly overpaid and whose Social Security Title II benefits were

adjusted on a timely annual report by the beneficiary herself or himself, as of: (If possible, give this information for the State of Hawaii alone; if not, please answer this question with reference to the same geographical unit which was used in answer to Interrogatory #6)

a. January 1, 1971;
b. January 1, 1972;
c. to date in 1973.

A. Refer to answer to Interrogatory #6.

INTERROGATORY #35:

Under the new procedures, before benefits are adjusted pursuant to 42 U.S.C. § 404(a), does the recipient have

a. the opportunity to appear personally and through counsel in front of an impartial hearing examiner?

b. the opportunity to present evidence orally?

c. the opportunity to confront and cross-examine adverse witnesses?

d. the right to a written decision by an impartial decisionmaker (sic) based solely on the rules and evidence adduced at the hearing?

e. the right to have the decision made on the basis of substantial evidence?

f. the right to subpoena witnesses and compel the production of records?

g. the right to see the records as to earnings and the computations of the Department.

A. a. — no
b. — yes
c. — no
d. — no
e. — yes
f. — no
g. — yes, as appropriate to the beneficiary.

Prior to an initial determination of an overpayment being effectuated, the notice of the determination is to be issued at least 30 days in advance of the recoupment action to be undertaken. As set out in the text of Section 5503 of the Claims Manual of the Social Security Administration (see answer to Interrogatory #1) the notice is to advise of the overpayment and how it occurred, the adjustment action to be undertaken, the right to reconsideration of the initial determination, and the requirements for consideration of waiver of recoupment of the overpayment or partial adjustment against benefits. The beneficiary is permitted 30 days from the date of the notice to respond to the notice and thus contest the proposed overpayment determination or to seek waiver or partial adjustment. If he does not so respond to the initial determination the recoupment action will be undertaken.

During the 30 day period, he may present evidence orally at a Social Security District Office which will reduce it to writing in a statement for his review and signature—which then becomes part of the evidence in his case (if he cannot come to the district office because of infirmity, a field representative would be available to visit him). He may also submit any additional evidence he wishes for purposes of rebutting the basis of the initial overpayment determination, and may also examine the evidence on which the determination is based as provided at Section 7305 of the Claims Manual (which may be examined at a Social Security District Office). And he may request consideration for waiver or partial adjustment against future benefits for recoupment of the overpayment. If the plaintiff within the pertinent 30 day period so indicates his wish to contest the initial determination by filing for reconsideration, formally or inferentially, or to seek waiver or partial adjustment, the recoupment action will be deferred until the matter is reconsidered and a reconsideration determination is issued or an initial determination with respect to waiver, if limited thereto. In the course of reconsideration, additional evidentiary development is undertaken in connection with all issues to be resolved as set forth in 20

C.F.R. 404.911 *et seq.* and Section 7120 of the Claims Manual (which may be examined at a Social Security District Office). As to confrontation of adverse witnesses at this stage of the proceeding, Section 5030(d) of the Claims Manual (which may be examined at a Social Security District Office) provides that payments to a beneficiary will not be interrupted until the beneficiary or his representative payee has been informed of the evidence and given an opportunity to confirm or deny the accuracy of the report. If denied, additional evidentiary development is undertaken to resolve the conflict. The beneficiary is also advised of the provisions of law that might afford him relief such as waiver and reconsideration.

Commissioner Robert M. Ball in the Commissioner's Bulletin dated August 2, 1972 (Exhibit 3 attached hereto) at the last paragraph thereof states that official policy and procedures must be implemented in the course of employees of the Social Security Administration properly carrying out their duties and that failure to do so may deny an individual such rights as are available to him. If, as in the instant case, instructions have not been wholly applied, then upon the case and deficiencies being brought to the attention of the Social Security Administration, the deficiencies will be corrected to the greatest extent possible so that wrongs in the individual case may be righted.

INTERROGATORY #36:

List with particularity what evidence a recipient must produce in order to avoid immediate recoupment of an alleged overpayment.

a. under pre-June 22, 1972 regulations.

b. under post-June 22, 1972 regulations.

A. Prior to implementation of the new procedures, the Claims Manual instruction in CM 5503(b) (TS# 2127 dated October 1968) provided that before the Administration began withholding benefits to recover an overpayment, the beneficiary or his payee would normally be

given reasonable opportunity to contest the correctness of the determination of overpayment or to establish that a basis exists for waiver or partial adjustment. The notice to the beneficiary advised that adjustment would be deferred 30 days. However, actual adjustment could at the discretion of the reviewing office be extended to a longer period where the facts in a given case, including but not limited to time case is being worked, cut-off dates, mailing time, etc., indicate that a 30-day period would be inadequate for consideration of the matter and reply by the beneficiary and reviewing office processing time. (This rule applied only to the processing of the overpayment action; it did not permit any delay in correcting an erroneous award or in withholding future benefits where deduction or nonpayment events applied.)

The above general rule, however, was not applicable under any of the following conditions:

1. The evidence in file clearly established that the overpaid person was not without fault.

2. The overpayment was equivalent to one month's benefit or less.

3. Entitlement would soon terminate (as, for example, in the case of a child almost age 18).

4. Waiver or partial adjustment development had been initiated. In such cases withholding would be deferred until development was completed. Where development would not be completed before the expiration of the 30-day period, the DO would wire or use dispatch mail, as appropriate, to advise the PC.

5. The overpayment was based on a voluntary annual report by the beneficiary. (In these cases an immediate adjustment action is taken.)

6. Benefits payable to the overpaid person were suspended or deferred at the time the decision was made to recover.

If the overpaid person did not protest the action within the time period allowed by the written notice, recovery

action was undertaken. If the overpaid person protested by raising some question about the correctness of the determination of the overpayment, or raised a question about recovery, waiver, or partial adjustment, the DO would obtain the necessary evidence and prepare a recommendation to the PC for disposing of the case. Thus, if the overpaid person requested reconsideration of the substantive determination, but also indicated that he believed relief from repayment should be granted if the decision was affirmed, the DO developed the possibility of waiver of adjustment or recovery of the overpayment at the same time it secured evidence to resolve the request for reconsideration.

Therefore, under the old procedures, the overpaid individual need not have submitted any evidence to avoid immediate recoupment action but merely have requested a reconsideration of the overpayment determination or for relief by waiver of recovery or through partial adjustment.

B. After implementation of the new procedures the instructions in CM 5503(b) (TS# 2743 dated March 1972) were modified to provide that before we start to adjust the overpayment against the benefits due a beneficiary, he or his payee will normally be given reasonable opportunity to contest the correctness of the determination or to establish that a basis exists for waiver or partial adjustment. The notice to the beneficiary advises him that adjustment will be deferred 30 days. However, actual adjustment may at the discretion of the reviewing office be extended to a longer period when the facts in a given case, including but not limited to time case is being worked, cutoff dates, mailing time, etc., indicate that a 30-day period would be inadequate for consideration of the matter and reply by the beneficiary and reviewing office processing time.

The only exceptions to this rule are:

1. The overpayment is based on an annual report by the beneficiary; or

2. The overpayment results from the superendorsement procedures under Section 205(n) of the Act

whereby payment of a combined check is made to the survivor. Under such circumstances, the surviving beneficiary is given advance notice of the adjustment action that will be taken to recoup the amount of the check which exceeds the amount to which the surviving individual is entitled in his own right. In the above two situations an immediate adjustment action is taken.

If the beneficiary responds raising some question about the correctness of the determination of overpayment, or raises a question about recovery, waiver or partial adjustment, the DO will obtain the necessary evidence and prepare a recommendation to the reviewing office for disposing of the case. Thus, if the person liable requests reconsideration of the substantive determination and it appears that the determination will be affirmed, the DO will develop the possibility of waiver of adjustment or recovery of the overpayment at the same time it receives evidence to resolve the request for reconsideration. Thus, if the substantive determination is affirmed the reconsideration determination will cover both issues.

Where reconsideration of the overpayment determination, waiver, or partial adjustment development is initiated, withholding to recoup the overpayment will be further deferred and payment will be continued until development has been completed, if the beneficiary is otherwise entitled to benefits. If development will not be completed before the expiration of the 30-day period, the DO will utilize teletype to advise the reviewing office.

Where action has already been taken to recoup an overpayment, i.e., subsection (1) or (2) above, or where the beneficiary did not respond until after the deferral period, if the beneficiary requests either waiver, partial adjustment, or reconsideration of the overpayment determination and benefits are otherwise payable, payment of benefits will be initiated effective with the current operating month until such time as the issue has been resolved.

If the beneficiary does not respond to the written notice by the expiration of the time allowed, or responds without protest, the Administration will proceed to recoup the overpayment by adjustment where possible. If there are no subsequent benefits, such further recovery action as is appropriate will be taken.

Therefore, under the new procedures the beneficiary need not present any evidence to avoid immediate recoupment but need merely request a reconsideration of the overpayment determination or relief by waiver of recovery or partial adjustment.

INTERROGATORY #37:

List with particularity what evidence a recipient must produce in order to avoid immediate reduction or termination:

a. under pre-June 22, 1972 regulations
b. under post-June 22, 1972 regulations

A. Refer to #36 above.

INTERROGATORY #38:

List the names, titles and addresses of the persons employed by the Social Security Administration within the State of Hawaii who:

a. compile or collect the evidence produced by a recipient under § 5500 *et seq.*;

b. determine whether the evidence is sufficient to avoid adjustment;

c. determine whether the Social Security Administration will waive recoupment.

A. These actions are taken in the performance of official duties by Administration employees throughout the country who are authorized to perform adjudicative functions. The Secretary of Health, Education, and Welfare has responsibility for the actions taken by employees of the Department within the scope of their official duties.

INTERROGATORY #39:

Do employees of the local offices of the Social Security Administration explain (either written or orally) to recipients who have received notice of an adjustment?

a. what information served as the basis of the adjustment.

b. the sources of that information described in a.

c. what evidence the recipient must produce to stop that adjustment.

A. a. Yes
b. Yes
c. Yes

See CM 7108 for the applicable procedure.

INTERROGATORY #40:

If a recipient comes forward within the 30 day period referred to in Interrogatory 25(a) but the Social Security Administration determines that adjustment of his benefits will proceed:

1. Is the recipient informed of his right to appeal that determination?

2. Does he receive his pre-adjustment social security benefits while his appeal is pending?

3. Is he advised, and if so, what is he told concerning the length of time which an appeal usually takes?

A. 1. Yes. Such information is routinely furnished in the notice of the reconsideration and/or waiver determination.

2. Adjustment action is deferred during the course of developing a request for waiver of recovery or reconsideration. If the reconsideration determination affirms that the individual is overpaid and if relief is not granted—either through waiver of recovery of the overpayment or through partial adjustment, recovery action is taken while the beneficiary

pursues his administrative remedies beyond the reconsideration level.

3. Upon receipt of a reconsideration request the median time for additional evidentiary development to accord the claimant maximum consideration is 74 days. The median time for a reconsideration determination to be rendered thereafter by the Administration is 20 days. Upon receipt of a request for an administrative hearing the median time for decision to be rendered is 96 days (during which all pertinent issues were considered). The claimant would be furnished this information if he requested it.

DATED: April *10*, 1973, at Honolulu, Hawaii.

/s/ Robert K. Fukuda
ROBERT K. FUKUDA
United States Attorney
District of Hawaii

VERIFICATION

I hereby verify that the foregoing answers to the interrogatories are true to the best of my knowledge.

/s/ Robert K. Fukuda
ROBERT K. FUKUDA
United States Attorney
District of Hawaii

Subscribed and sworn to before me
this 10th day of April, 1973.

/s/ Lumimi Y. C. Calderon
Deputy Clerk
U.S. District Court
for Hawaii

LIST OF EXHIBITS

	Exhibits
Claims Manual Transmittal Sheet No. 2593	1
Claims Manual Transmittal Sheet No. 2743	2
Commissioner's Bulletin No. 117	3

EXHIBIT 1

June 1, 1971

CLAIMS MANUAL TRANSMITTAL SHEET No. 2593*

Listing of Material Included in This Transmittal

OVERPAYMENTS

New Material	*No. of Pages*
§§ T5500-T5502	1

Explanation of Claims Manual Changes

This transmittal revises the policies and procedures for notifying an overpaid individual of the possibility of waiver. It also changes the policies and procedures dealing with notice of the right to reconsideration.

A recent court action (*Baker* v. *Finch*, U.S. District Court, N.D. Ga.) questioned the Administration's current policy of not notifying all beneficiaries of the possibility of waiver when they were determined to be overpaid. The Court indicated that the failure to give notice of the waiver provisions of the law to all beneficiaries alleged to have received overpayments may violate their right to procedural due process, and expressed the view that such notice should be given to all individuals found to be overpaid.

As a result of this decision, and because it is felt a similar exceptional situation with respect to notification of reconsideration rights is questionable, the following changes in policy have been approved by the Commissioner:

(1) In all notices of determinations of overpayment the individual liable shall be informed of the statutory provisions for waiver.

(2) The exception to our usual rule on notice of reconsideration rights (where a suspension or termination

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* TS No. 2592 covered CM Part 9 material.

action is based only upon facts reported by the claimant) is to be eliminated and notice given in connection with all notices of initial determinations.

These changes are effective immediately. Necessary revisions in other instructional material will follow.

ACTION NOTES

§ 5503(*a*).—Cross refer to § T5501. In (*a*)(4), delete the exception by placing a period after "(sec. 204(b))" and strike out balance of item 4.

In (a)(6) second line, delete the exception by placing a period after "determination" and delete remainder of paragraph.

§ 5587.8(*a*)(4), 4th line.—Delete the exception by placing a period after "waiver" and strike out balance of item 4.

§ 7105.—Delete last sentence.

§ 7106(*a*).—Cross-refer to § T5500. In sixth line place a period after "reconsideration" and delete balance of paragraph.

§ 7106(*c*).—Delete.

§ 8735.—Cross refer to §§ T5500-T5502.

NOTE TO ALL PAYMENT CENTERS AND DIVISION OF INTERNATIONAL OPERATIONS:

Distribute this transmittal to all Recovery Reviewers as well as to Claims Manual holders.

T5500. Notice of Right to Reconsideration of Initial Determination.—The notice of an initial determination will in *all* cases include a paragraph informing the individual of his right to reconsideration. This includes cases in which the determination is that a deduction or termination is to be made based upon facts reported by the claimant.

T5501. Written Notice of Overpayment—Inclusion of Statutory Provisions for Waiver.—When it is determined that an incorrect payment has been made, the written notice to the person liable will in all cases inform him of

the waiver provisions in the law—Social Security Act, sec. 204(b) in title II overpayments and sec. 1870(c) in title XVIII overpayments.

T5502. Notices About Overpayments—Sample Letters.—Sample letters in § 5508 (Exhibits 1-3) should be modified so that the reconsideration paragraph will be included in all instances when used as a basis for notices prepared for beneficiaries.

EXHIBIT 2

CLAIMS MANUAL TRANSMITTAL SHEET
No. 2743*

OVERPAYMENTS

New Material	*No. of Pages*	*Replaces*	*No. of Pages*
§§ 5502(*b*)-5508 (cont.) Exhibit 5	13	§§ 5503(*a*)-5508 (cont.), Exhibit 5	13
§§ 5517(*a*)-5521(*a*)	4	§ 5517(*a*)-5520.2	4
		§ T5502	1

Explanation of Claims Manual Changes

This transmittal makes a number of changes in policies and procedures as part of the effort to safeguard the rights of beneficiaries. Some changes are also made in the tolerance for recovery of overpayments to achieve manpower savings.

5503. Summary of Procedures for Dealing With Overpayments

(a) Written Notice

Expands the initial overpayment notice to inform the overpaid person of the availability of partial adjustment or partial refund. Also, changes the criterion for personal delivery of the overpayment notice from "3 months' benefits" to "6 months' benefits."

(b) Delaying in Withholding Benefits to Recover Overpayment

Points out the general rule of deferring adjustment action to recover an overpayment, except for the following situations:

(1) The overpayment is based on a timely annual report by the beneficiary. In this respect, we are currently

* TS No. 2742 covered CM Part 8 material.

in the process of defining and analyzing various alternatives which may allow for the elimination of this exception. However, we expect that it will take some time to arrive at final decisions; *or*

(2) The overpayment results from the superendorsement of a combined check after the death of the copayee. Under such circumstances the surviving beneficiary is given advance notice of the adjustment action that will be taken to recover the overpaid amount.

(b) Person Liable Protests

This section now provides that when the overpayment is based on a timely annual report and benefits are being withheld to recoup the overpayment, if the beneficiary requests waiver, partial adjustment, or reconsideration of the overpayment determination, payment of current benefits otherwise payable, will be promptly initiated and continued until such time as the issue has been resolved.

5506. DO Delivery of Initial Notice to Persons Liable

Provides the DO with discretion to dispense with personal delivery of the initial overpayment notice in unusual cases.

5507.2 Overpayment Procedures Chart—Entitlement Not Terminated

The tolerance for referring overpayment recovery requests (SSA-5095) to the DO where benefits have not terminated has been changed to "over 6 months' benefits."

5516-5517.5 Partial Adjustment

The procedures have been simplified so that hardship will be presumed if the beneficiary requests that his overpayment be recouped by partial adjustment in the absence of evidence to the contrary. A Refund Questionnaire will be necessary only if there is some reason to question the presumption.

ACTION NOTE

§ 5526(*b*), Second sentence—Change "3 months' benefits or $200, whichever is greater" to "6 months' benefits."

NOTE TO ALL PAYMENT CENTERS AND DIVISION OF INTERNATIONAL OPERATIONS:

Distribute this transmittal to all Recovery Reviewers as well as to Claims Manual holders.

March 22, 1972

EXHIBIT 3

Commissioner's Bulletin

SOCIAL SECURITY ADMINISTRATION

Number 117 August 2, 1971

DUE PROCESS IN THE SOCIAL SECURITY PROGRAM

To Administrative, Supervisory, and Technical Employees

We in SSA are now in the process of taking a close look at our policies and procedures on terminating and suspending benefits to make sure that in every regard they safeguard the rights of all social security beneficiaries. As a result of this review, we are finding a few places where we need to change or provide further emphasis. I would like to share with you some of the reasons for the actions we are taking, and to ask all of you to help make our policies effective.

Several recent court cases raised the question of whether SSA's procedures for suspending and terminating benefits provide for administrative "due process"—that is, whether they protect the beneficiary's right to receive a full explanation and a chance to tell his side of the story before we take action affecting his benefits. Most of these court cases appear to have been stimulated by a landmark Supreme Court decision, *Goldberg* v. *Kelly*. In this case, the Supreme Court ruled that before a welfare recipient's payments are stopped, he has the right to a hearing at which he can present evidence to show why he believes they should not be stopped.

Although this decision was limited to welfare recipients, several court actions have been filed in which social security beneficiaries have claimed the same right to a hearing before benefits are reduced, terminated, or suspended. Two recent United States district court decisions could have a major impact upon SSA's procedures. In *Wright* v. *Finch*, the court ruled that before a dis-

abled person's benefits could be suspended, he must first be given an explanation for the proposed suspension, and allowed to examine the documents on which the suspension would be based and to present any evidence he has in support of his claim for continued benefits. The case of *Baker* v. *Finch* questioned SSA's procedures for suspending benefits when it is necessary to recover an overpayment. The court did not rule that SSA must provide a hearing in all cases before recovering an overpayment. It did say, however, that it believed SSA must inform *all* overpaid beneficiaries of the "waiver" provisions in the law before taking recovery action.

It is not clear exactly what the full implications of these court decisions will be. Also, a number of cases on the same or related issues (including the *Wright* case) are still pending before the courts. However, there is no need to wait until all the issues are decided by the courts before we take action. If there are policies or procedures in SSA that do not give beneficiaries due process, it is our obligation to seek out these policies and procedures on our own initiative and see that they are changed. As we reevaluate our work in this light, a number of questions come to mind:

- Are there any situations where we may have deprived beneficiaries of due process by failing to develop all the pertinent facts in a case, and reporting them to the decisionmaker?
- Are there any instances in which we make a decision to stop payments where we are making that decision too quickly, without sufficient evidence?
- Are our procedures adequate to give the beneficiary his "day in court" whenever we stop his benefits?
- Are we telling the beneficiary about all his rights and making sure that those rights are fully protected?
- Is there anything more we should be doing to be sure that we are not depriving beneficiaries of their benefits without due process of law?

One example of a policy improvement we have already made involves the selection of representative payees for adults who seem unable to care for themselves but who have not been declared legally incompetent. Until recently, it was our policy to make a *final* determination of a beneficiary's inability to handle his own benefits based on the best available evidence (usually medical). If we decided a beneficiary was incapable, he was not given the right to a formal reconsideration or hearing. Late last year we changed the SSA regulations so that a person may request a hearing and judicial review on our decision regarding his capacity to handle benefits. This right to a hearing and an appeal is now available to all adult beneficiaries except those who have been judged legally incompetent.

Another change involves notifying a person of his right to a reconsideration of our initial determination. In the past, we explained this right in all cases *except* where a person's benefits were affected based upon facts he himself reported. In these cases, we assumed that the individual was aware of the effect of his report on his benefits and did not need to be told of his right of reconsideration when we suspended them. But this assumption may not always be valid. For example, a beneficiary may report earnings to us without understanding that the report will result in a determination of overpayment and a suspension of benefits. We have changed our instructions to require that every claimant be given notice of his right to reconsideration when an initial determination is made.

We have taken similar action regarding our procedures for notifying overpaid beneficiaries of the possibility of waiver. Until 1963, an overpaid beneficiary was not notified of the waiver possibility unless he protested the determination of overpayment. Since that time, we have given an explanation of the waiver provision to all overpaid persons unless (a) the amount of the overpayment is equal to 1 month's benefit or less, or (b) the overpayment is based on a voluntary annual report of earnings by the beneficiary, or (c) the evidence clearly indi-

cates that the beneficiary is *not* without fault in causing the overpayment. Even though many people in these categories would probably not be eligible for waiver if they requested it, the *right* to request waiver is guaranteed to all overpaid beneficiaries under the OASDHI program, and all overpaid beneficiaries should understand this right. Therefore, we have changed our procedures so that *all* beneficiaries will be advised of the waiver provision when they are overpaid.

Finally, we are reviewing our suspension, adjustment, and termination procedures to make sure they are flexible enough to meet the needs of the individual beneficiary. Not only must we fully inform people of their rights under the program, we must inform them in ways they can understand. We are now re-examining notices of termination, suspension, and reduction of benefits to see that they spell out clearly and simply the reasons why the action is being taken. This is especially important as we make increased use of the telephone and the mail in doing business with the public. We should also keep in mind that there may be some situations—for example, a complex overpayment—where a personalized letter would be more appropriate than a form or guide letter. When preparing such a letter, we must remember that our beneficiaries represent a wide range of formal education, social environment, and other factors that could be barriers to communication.

We will continue to look for additional ways to make our policies and procedures more equitable and flexible. But policies and procedures alone, no matter how equitable we make them, cannot guarantee that an individual who deals with SSA will receive due process. The best guarantee of that is concerned and dedicated employees who see the need to comply not merely with the literal meaning of policies and procedures, but also with their underlying purpose. This means all of us who meet the public, directly or indirectly, must make an extra effort to be sure that people we deal with understand our decisions,

the reasons for them, and their right to challenge them if they so desire.

/s/ Robert M. Ball
ROBERT M. BALL
Commissioner

DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS

1974

Nov 12 FILED APLT'S MOTION FOR STAY PENDING APPEAL. (McAvoy) USA

Nov 12 DOCKETED CAUSE & ENTD APPEARANCES OF COUNSEL.

Nov 12 FILED APLES' MEMORANDUM IN OPPOSITION TO MOTION FOR STAY. (to McAvoy) cs

Nov 12 Filed, as of November 8, 1974 in 74-1611, aplt's motion to consolidate appeals. (to McAvoy) cs

Nov 21 FILED CERT TRANSC OF RECORD ON APPEAL IN ONE VOLUME: PLEADINGS, ORIGINAL ONLY. ONE BOX OF EXHIBITS FILED IN RM. 219. cl

Nov 21 Appellant's brief due Dec 12, 1974. cl

Nov 26 Filed in 74-1611 Order (Goodwin & Sneed) consolidating appeals for purposes of consideration and oral argument; further Ordered aplts' brief in 74-3118 shall be filed on or before December 16, 1974; Aples' brief shall be filed on or before January 6, 1975 & Aplts' reply brief shall be filed on or before January 16, 1975. The Clerk shall calendar the cases for oral argument in San Francisco during the week of February 14, 1975. Aples' application for stay pending appeal in 74-3118 is hereby denied. cs

Dec 5 Filed order (Sneed) amending in the last paragraph court's order entered 11/26/74; upon due consideration, aplt's application for a stay pending appeal in 74-3118 is hereby denied. jr

Dec 6 Rec'd aple counsel's letter eliminating Robert J. LeClair as attorney of record. jr

Dec 10 FILED AS OF DECEMBER 4, 1974 TWO ADDITIONAL COPIES OF RECORD, VOL I. cl

DATE	FILINGS—PROCEEDINGS

1974

Dec 13 Filed aplt's motion for leave to file brief in typewritten form and to supplement record references to (C) with copy of brief. jr

Dec 24 Filed order (C) granting aplt leave to file brief in typewritten form and to supplement record references. jr CALENDARED 2-10-75 S.F.

Dec 24 FILED APPELLANT'S TYPEWRITTEN BRIEFS. cs (panel)

1975

Jan 7 FILED ORIG & 24 APPELLEE'S BRIEF (1-6-75) to (panel) sj

Jan 8 RECEIVED ORIG & 24 APPELLANT'S BRIEF (12-12-75) (panel) sj

Jan 13 Filed motion & order (Br) directing clerk to file the brief. jr

Jan 13 FILED 25 APPELLANTS BRIEF (12/12/74). cl To panel.

Jan 20 Filed aplt's motion for leave to file reply brief in typewritten form. To panel w/ copy of brief. cl

Jan 22 Received aple's letter in 74-1611 requesting thirty minutes additional time for argument. To panel. cl

Jan 23 Filed order (Br) granting aplt leave to file reply brief in typewritten form. jr

Jan 23 Rec'd, in 74-1611, additional citations for aples in 74-3118 to (panel). jr

Jan 23 FILED 4 APPELLANTS REPLY BRIEFS (1/16/75). cl (TYPEWRITTEN)

Jan 29 FILED 25 APPELLANTS BRIEFS (1/16/75). To panel. cl

Feb 3 Rec'd, in 74-1611, aples' (Elliott, et al) add'l citations to panel. jr

DATE	FILINGS—PROCEEDINGS

1975

Feb 3 Rec'd aples' (Buffington, et al) additional citations to (panel) in 74-1611. jr

Feb 4 Pursuant to instructions from the court; Clerk's letter advising counsel request for add'l time for oral argument has been denied. gb

Feb 10 Argued & submitted to Br, T, CJJ; & S. Williams, DJ.

Feb 10 Filed aple's additional authority. To panel. cl

Feb 25 Recvd, in 74-1611, government counsel's letter re add'l information requested during court session. (to panel) cs

Apr 24 Rec'd aplt's letter of additional citations to (panel). jr

Apr 30 Rec'd aple's letter for case to be decided without awaiting the Supreme Court's disposition of Eldridge v. Weinberger to (panel). jr

June 13 Recd aple's letter of June 11, 1975 re recent decisions by CA, 3rd Cir. (panel) ec

Jun 30 Rec'd aplt's letter of additional citations to (panel). jr

Sept 18 Rec'd in 74-1611, aplt's letter of Sept 16, 1975 re recent decision in Fisher, et al. vs. Secy, HEW, et al., 7th Cir. (panel) ec

Sept 26 Rec'd aplts' letter of additional citations to (panel). jr

Oct 1 ORDERED OPINION (S. WILLIAMS) FILED & JUDG TO BE FILED & ENTD

Oct 1 Filed opinion—Affirmed in part, reversed in part & remanded.

Oct 1 Filed & Entered Judgment. jr

Oct 13 Pursuant to instructions from Judge Browning, mandate not to issue until further of the court. jc

DATE	FILINGS—PROCEEDINGS

1975

Oct 30 Filed in 74-1611, appellees' motion & affidavit for ext of time in which to file Petition for Rehearing and suggestion for rehearing in banc. (panel) ec

Oct 30 Rec'd an orig. & 24 Petition for Rehearing and Suggestion of appropriateness of a rehearing en banc. (panel) ec (in 74-1611)

Nov 10 Filed in 74-1611, Order (Br) to file petition for rehearing, -acb-

Nov 20 Filed, in 74-1611, order (Melfi for the Court) defendants-appellants are requested to file a response to the petition for rehearing. jr

Dec 18 Filed in 74-1611, Appellants' opposition to Appellees' Petition for Rehearing and Suggestion of the Appropriateness of a Rehearing En Banc. (all active judges) ec

1976

March 4 Received Supreme Court notice that petition for certiorari was filed on February 27, 1976, assigned number 75-1234. wdt

March 4 Received Supreme Court notice that petition for certiorari was filed on February 27, 1976, assigned number 75-1234. wdt

Mar 15 Filed Appellees' motion for an order requiring the parties to submit supplemental briefs. (panel) ec

Mar 22 Rec'd from appellees letter dated March 15, 1976, re typo errors in motion for an order requiring parties to submit supp. briefs. (panel) ec

Mar 22 Filed Appellant's opposition to appellees' motion for order requiring the parties to submit supp. briefs, etc. (panel) ec

DATE	FILINGS—PROCEEDINGS

1976

Mar 30 Filed order (S. Williams) directing the parties to submit add'l briefs on the impact, if any, of the recent Supreme Court decision in *Eldridge* v. *Weinberger*, rr U.S.L.W., 4224 (February 24, 1976). Aplts' brief shall be filed within 30 days of the date of this order & the brief for aples shall be filed within 30 days of their receipt of aplts' brief. (Aplts brief due 4/29/76) jc

Apr 22 Filed Appellants' motion for ext of time to file supplemental brief. (panel) ec

May 3 Filed order (S. Williams) granting aplts an ext of time to file supplemental brief to and including May 24, 1976. -dmf-

May 26 Filed Appellants' motion for ext of time to file supp. brief. (panel) ec

June 1 Rec'd from Stanley E. Levin, Esq., letter dated May 27, 1976, re: aplts' motion for ext of time for filing supp. brief. (panel)

June 29 Filed order of Judge Spencer Williams granting appellants' motion for a thirty-day extension to June 23, 1976 to file their supplemental brief. wdt

June 25 Filed in 74-1611, aplts' motion for 7-day ext of time in which to file supp. brief. to Judge S. Williams ec

July 1 Filed in 74-1611, aplts' motion for a 28-day ext of time in which to file supp. brief. to Judge Wms., S. ec

July 2 Filed, in 74-1611, order (S. Williams) granting aplts a 7-day ext of time to file supplemental brief, to and including June 30, 1976. -dmf-

July 6 Filed, as of June 24, 1976, copy of Supreme Court order granting certiorari. To panel. wdt

July 6 CASE RE-OPENED—1534 prepared

DATE	FILINGS—PROCEEDINGS

1976

July 6 Filed, as of June 24, 1976, certified copy of Supreme Court order remanding this case and No. 74-1611 to this court pursuant to Mathews v. Eldridge, filed in the Supreme Court on February 24, 1976. To panel. wdt

July 9 Filed in 74-1611, order (Williams) granting aplts an ext of time of 28 days in which to file their supplemental brief; brief due July 28, 1976. -dmf-

July 30 Filed in 74-1611, aplts' motion for a 14-day ext of time in which to file supplemental brief. (S. Williams) ec

Aug 9 Filed, in 74-1611, order (Br) granting appellants' motion for a 14-day ext of time, to and including August 11, 1976. -pb-

Aug 13 Filed in 74-1611, aplts' motion for leave to file their supp. brief in typewritten form pending repro. to panel w/brief ec

Aug 30 Rec'd in 74-1611, Aplt's supplemental briefs (8/11/76) (motion for leave to file supp. brief in typewritten form, under submission) -pb-

Sept 7 Filed in 74-1611, aples' motion for ext of time in which to file responsive supp. brief. panel ec

Sept 13 Filed in 74-1611, order (S.Wms) granting aples 30 days (From Sept 10) ext of time in which to file responsive supp. brief. (Due Oct. 10, 1976)

Sept 15 Filed, in 74-1611, as of Sept 13, order (S. Williams) granting aplts leave to file supplemental brief in typewritten form. -dmf-

Oct 11 Filed aples' (Buffington & Biner) motion for ext of time in which to file responsive supp'l brief. Br, T. & S. Williams) ec

Oct 18 Filed, in 74-1611, order (S. Williams) granting aples' Buffington, Biner, etc) an ext of 30 days, to and including November 11, 1976 to file their responsive brief. jr

DATE	FILINGS—PROCEEDINGS

1976

Nov 12 Filed in 74-1611, appellees' motion for ext of time in which to file their responsive supplemental brief. (panel) ec

Nov 15 Filed, in 74-1611, order (S. Williams) granting aplees an ext of time of 30 days to file responsive supplemental brief (due December 10, 1976) -dmf-

Dec 3 Filed in 74-1611, Appellees' motion for ext of time in which to file responsive supplemental brief. (S. Williams) ec

Dec 8 Filed in 74-1611, order (S. Williams) Upon due consideration of the motion of aples, it is hereby ORDERED that the aples' are granted an ext of time of 7 days, to and including Dec. 17, 1976, in which to file their responsive brief. -fn-

Dec 9 Filed, in 74-1611, order (T) upon consideration of the motion of appellees for a 7-day ext of time, it is hereby ordered that the afore-said motion is granted. -dmf-

Dec 17 Filed in 74-1611, orig. & 25 copies Aples' (Elliott, Molina, Buffington & Biner) supplemental briefs. (12/16/76) -pb- to panel

1977

Mar 17 Filed in 74-1611, aples' motion for oral argument on aples' petition for rehearing & the pending reconsideration of the original decision required by the order of remand. (panel) ec

Mar 28 Filed in 74-1611, aplts' (USA, et al) response to aples' motion for oral argument. panel ec

July 1 Filed, in 74-1611, order (Br, T & S. Williams) aples' motion for oral argument is denied. jr

July 1 ORDERED OPINION (WILLIAMS) FILED & JUDG TO BE FILED & ENTD

July 1 Filed opinion—The judgments of the D.C.'s are affirmed in part and reversed in part, and the cases are remanded.

DATE	FILINGS—PROCEEDINGS

1977

July 1 Filed & Entd Judgment. -fn-

July 13 Filed in 74-1611, appellants' motion for ext. of time in which to file Petition for Rehearing. (panel) ec

Aug 4 Filed, as of July 28, in 74-1611, order (SPENCER WILLIAMS) On consideredation of aplts for a 30 day ext of time in which to file their petition for rehearing and suggestion for rehearing en banc, it is hereby ORDERED that the motion is GRANTED in case #'s 74-1611 & 74-2118. (Petition due 8-14-77) -fn-

Aug 17 Filed in 74-1611, aplts' motion for ext of time in which to file Petition for Rehearing. (panel) ec

Aug 24 Rec'd, in 74-1611, 25 copies Aplt's petition for rehearing and suggestion for rehearing en banc. 8-23 bc (panel)

Aug 27 Filed, as of 8/25/77, in 74-1611, order (Br) on consideration of the motion of aplts for a 10 day ext of time in which to file their petition for rehearing and suggestion for rehearing en banc, it is hereby ORDERED that the aforesaid motion is GRANTED. jr

Aug 27 Filed, in 74-1611, as of 8/25/77, 25 Aplts' Petition for Rehearing and Suggestion for Rehearing En Banc to (All Active Judges). jr 8/23/77

Dec 16 Filed, as of Dec. 15, in 74-1611, order (BR & T, CJJ & WILLIAMS, DJ) The petition for rehearing is denied and the suggestion for in banc rehearing is rejected in case 74-1611 & 3118. -fn-

1978

Jan 3 MANDATE ISSUED

Jan 16 Returned to D.C. Vol 1 of Pleadings ORIGINAL mm

Apr 27 Recd SC notice of filing on 4/21/78 petition for certiorari, assigned #77-1511. Th.

Oct 5 Filed certified copy of Supreme Court order granting certiorari on October 2, 1978. (panel) pn

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IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 734-73C2

[Filed Dec. 11, 1973]

FANNIE BUFFINGTON and FRANCES BINER,
individually and on behalf of
ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

vs.

CASPER WEINBERGER, individually and in his capacity
as Secretary of the Department of Health,
Education and Welfare, DEFENDANT

COMPLAINT FOR MANDAMUS, INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT

PRELIMINARY STATEMENT

Plaintiffs individually and on behalf of all other persons similarly situated, seek mandamus, injunctive, and declaratory relief in asking the Court to declare invalid and to enjoin the enforcement of 42 U.S.C. § 404, *et seq.* (Social Security Act) and regulations thereunder, which statute and regulations permit defendant Secretary of Health, Education, and Welfare to terminate the payment of benefits under 42 U.S.C. § 402 (old-age and survivors and old-age insurance benefits) without affording plaintiffs adequate notice and an oral evidentiary hearing prior to the termination or adjustment of such

benefits. The statute and regulations are challenged on the grounds that they are in conflict with the due process clause of the United States Constitution.

Plaintiffs seek a preliminary and permanent injunction prohibiting suspension, reduction, or adjustment of said benefits without affording notice and opportunity for a hearing which satisfy the requirements of the due process clause. Plaintiffs seek a preliminary and permanent injunction enjoining defendant from failing or refusing to restore all of plaintiffs' benefits which have been or will be suspended or adjusted without notice and a hearing.

Plaintiffs bring this action in mandamus to compel the defendant to obey certain statutory duties imposed on him by 42 U.S.C. § 404(a) and (b) and the regulations thereunder, which require the defendant to afford notice and a hearing, and, also, to make a pre-termination decision on the issues of fault and waiver.

JURISDICTION

1. Jurisdiction is conferred on this Court by:

a. 28 U.S.C. § 1361, in that this is an action in the nature of mandamus to compel the Secretary to perform duties owed to the plaintiffs and their class under the Fifth Amendment to the United States Constitution and the Social Security Act, and

b. 28 U.S.C. § 1331 (a), in that this is a civil action wherein the matter in controversy exceeds the value of $10,000.00 exclusive of interest and costs, and arises under the Fifth Amendment to the United States Constitution and the federal Social Security Act; or in the alternative 28 U.S.C. § 1346 (a)(2), in that this is a civil action against the United States, not exceeding $10,000.00 in amount, founded upon the Fifth Amendment to the United States Constitution and the federal Social Security Act and the regulations promulgated thereto; and

c. the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*, which confers [jurisdiction] upon the federal courts to review federal agency action.

II

PLAINTIFFS

2. Mrs. Fannie Buffington, age 68, resides with her husband, Ossie Buffington, at 1525 26th Avenue East, Seattle, Washingon. She has been receiving social security benefits since her retirement. Frances Biner, age 68, resides with her daughter at 3015 East Cherry Street, Seattle, Washingon. Ms. Biner had been receiving benefits since her retirement in December, 1972.

III.

CLASS ACTION ALLEGATIONS

3. Plaintiffs bring this action as a class action under Fed. R. Civ. P. 23(a) and 23(b)(2) on behalf of all persons similarly situated.

4. The members of the class are all Social Security recipients, who are being or will be subjected to termination, suspension or reduction of their Social Security benefits pursuant to 42 U.S.C. §§ 404(a) and (b) without constitutionally adequate notice of the grounds for such action, and without a prior oral hearing on disputed issues relating to such action.

5. The exact size of the class is not known to plaintiffs, but, on information and belief, can be readily ascertained from information in possession of the defendant. Nevertheless, plaintiffs believe that the class, is so numerous that joinder of all members is impracticable.

6. There are questions of law or fact common to the class, to wit, whether defendant's termination, suspension or reduction of Social Security benefits without giving constitutionally adequate notice of the grounds for such action, and without granting a prior oral hearing on disputed issues relating to such action is violative of the Due Process Clause of the United States Constitution.

7. Plaintiffs' claim is typical of the claims of the class.

8. Plaintiffs can fairly and adequately protect and represent the interests of the class, as she is represented

by Seattle Legal Services Center, Inc., a non-profit public service legal services organization which has resources in civil litigation involving government benefits and constitutional questions, and which in the past has successfully protected in federal court the due process rights of indigents receiving government benefits.

9. The party opposing the class has acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief for the class as a whole.

IV.

DEFENDANT

10. Defendant, Casper Weinberger is Secretary of Health, Education and Welfare, and as such is charged with the administration of Title II of the Social Security Act, 42 U.S.C. § 401 *et seq.*, and in particular with the responsibility of making determinations respecting the termination, suspension or reduction of benefits received by Social Security recipients. Moreover, under 42 U.S.C. § 405(a) he is charged with making such rules and regulations as are necessary to the enforcement, operation and execution of Title II of the Act.

STATEMENT OF FACTS

11. Plaintiff Frances Biner is a 68 year resident of Seattle, Washingon, whose primary source of income for 1973 was her Social Security benefits.

12. Ms. Biner retired on December 14, 1972, and shortly thereafter she received a social security check for over $1800.00. Thereafter she received monthly checks until October, 1973. Her monthly entitlement at this time is approximately $205.00.

13. In the latter part of September, 1973, Ms. Biner received a letter from the Social Security office informing her that there had been an overpayment in the amount of $2,233.60, and, consequently, her benefits would be withheld until the overpayments had been recouped. She was informed that she would not receive another

Social Security check until July, 1974. (A copy of that letter is attached as "Exhibit A"). She has not received any Social Security payments since that time.

14. In the middle of October, 1973, Ms. Biner received a second letter from the Social Security Administration, containing "without fault" and "waiver" or "hardship" forms which she was instructed to fill out and return to the Seattle office. Mis. Biner completed the forms and mailed them to the local office. [A copy of that letter is attached as "Exhibit B"].

15. On or about November 28, 1973, Ms. Biner requested a reconsideration of the overpayment. Such requests for reconsideration are decided by regional reviewing offices.

16. Prior to November, 1973, Ms. Fannie Buffington received monthly benefits of $89.90, while her husband received benefits of $159.30 per month.

17. During the 1st or 2nd week of October, 1973, Ms. Buffington received a letter from the Social Security office informing her that she had previously received an overpayment of $78.60, and consequently her November check would be reduced by that amount. (A copy of that letter is attached as "Exhibit C").

18. Two of three days after she received the letter Ms. Buffington went to the local Social Security office and informed an employee there that she could not afford to have her November check reduced by that amount. Ms. Buffington was told that a letter would be written to the regional reviewing office on her behalf.

19. On Friday, November 3, 1973, Ms. Buffington received a Social Security check in the amount of only $11.30.

20. On Monday, November 5, 1973, Ms. Buffington returned to the local office, where she was told that she would be notified when the reviewing office made a decision on her requests for waiver and partial adjustment.

21. On or about November 28, 1973, Ms. Buffington submitted a request for reconsideration to the local office.

22. The plaintiffs were not informed prior to the adjustment of their monthly checks of the reasons underlying the determination that the alleged overpayments

had occurred, nor were any hearings held prior to the termination or adjustment of their benefits.

23. Neither plaintiffs was ever notified that she had been determined to be with or without fault according to § 404(a) and (b) and the regulations thereunder, or that a waiver of overpayment had been considered. No hearings were held on those issues prior to the termination or adjustment of their benefits.

FIRST CAUSE OF ACTION—VIOLATION OF STATUTORY DUTY

24. Plaintiffs repeat, reallege and incorporate herein the allegations contained in paragraphs 1-23 of this complaint.

25. In attempting to recover alleged improper payments to plaintiffs, defendant has violated his statutory duty under 42 U.S.C. § 404(a) and (b), providing that, in cases where the Secretary finds that more than the correct amount of payment has been made, "there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

26. 42 U.S.C. 404(b) clearly requires that *prior* to adjusting a recipient's social security benefits for an alleged overpayment the defendant must determine whether or not the recipient was without fault, *and*, in cases where the recipient is found to be without fault, the defendant must also determine whether such adjustment would defeat the purposes of the Social Security Act *or* would be against equity and good conscience.

27. Defendant made no such findings or determinations prior to "adjusting" plaintiffs payments for the months in question.

28. It is defendant's usual and routine practice to suspend, terminate, or reduce benefits without inquiry as to fault or as to whether recovery would defeat the purpose of the Act or be against equity and good conscience, and without affording the recipient an oppor-

tunity to have notice of and hear the evidence against him or her, and without an opportunity to present evidence on these matters.

29. In the implementation of 42 U.S.C. 404(b) the defendant routinely determines an amount to be recovered against the recipient and deducts the amount without notice or right to a prior hearing.

30. Although the recovery action is reviewable upon application by the recipient, the defendant does not provide opportunity for any hearing prior to the recovery action or opportunity for the plaintiffs to know and respond to the evidence or other information upon which the defendant makes his determination to "adjust."

31. Defendant's routine procedures impose an undue and unfair burden upon the plaintiffs to prove affirmatively that the defendant's prior ex parte determination was incorrect.

31. Defendant's routine procedures impose an undue and unfair burden upon the plaintiffs to prove affirmatively that the defendant's prior ex parte determination was incorrect.

32. Many members of plaintiffs' class are without the means or ability to bear this burden of proof and must suffer the loss of substantial benefits and be reduced to a position of debtors.

33. The prior ex parte determination to recover or recoup without a prior showing by defendant that the overpayment was made through the fault of the plaintiffs-recipients or would not defeat the purpose of the Act or be against equity or good conscience is an arbitrary and capricious decision and violative of the statutory duty owed plaintiffs by the defendant as required by 42 U.S.C. § 404(a) and (b).

34. Plaintiffs have no plain adequate or speedy remedy at law and this suit for mandamus, injunctive, and declaratory relief is their only means of securing such relief.

WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

VII.

SECOND CAUSE OF ACTION—VIOLATION OF DUE PROCESS

35. Plaintiffs repeat, reallege and incorporate herein the allegations contained in Paragraphs 1-34 of this complaint.

36. Title II of the Social Security Act provides for old age insurance benefits as a matter of statutory entitlement to persons who meet criteria set forth in § 202 of the Act, 42 U.S.C. § 402.

37. Plaintiffs were determined to have satisfied all conditions for receipt of such benefits and to the best of plaintiffs' knowledge, information and belief are now entitled to the payment of the benefits which defendant terminated, suspended or reduced.

38. Plaintiffs' benefits were terminated by defendant and his agents pursuant to 42 U.S.C. § 404(a) which provides that under certain circumstances "proper adjustment or recovery shall be made" whenever there is an overpayment of social security benefits.

39. Section 404(b) of Title 42 provides that no recoupment of overpayments of Title II benefits shall be taken pursuant to 42 U.S.C. § 404(a) from any person who is "without fault" if such recovery "would defeat the purpose" of Title II or "would be against equity and good conscience."

40. 20 C.F.R. § 404.508, a regulation promulgated by the Secretary to enforce the Social Security Act provides in pertinent part as follows:

> Adjustment or recovery will defeat the purposes of Title II in (but is not limited to) situations where the person from whom recovery is sought needs substantially all of his current income (including social security monthly benefits) to meet current ordinary and necessary living expenses.

The full text of the Secretary's regulations with respect to overpayment and recoupment are attached hereto as plaintiffs' "Exhibit O."

41. Pursuant to 42 U.S.C. §§ 404(a) and (b) and regulations promulgated thereunder, the defendant has allegedly made *ex parte* determinations that:

a. Plaintiffs have received an overpayment of social security benefits;

b. that said alleged overpayments should be recouped by suspending plaintiff's social security benefits for the months described above;

c. That plaintiffs were at fault within the meaning of 42 U.S.C. 404(b) in receiving said alleged overpayments; or

d. that if plaintiffs were "without fault" within the meaning of 42 U.S.C. § 404(b), the suspension of their social security benefits by defendant would not defeat the purpose of Title II of the Social Security Act or be against equity and good conscience.

42. Defendant's decision to suspend plaintiffs' social security payments violated the Due Process Clause of the Fifth Amendment to the United States Constitution in that:

a. It was a peremptory, ex parte decision;

b. The defendant has not given plaintiffs notice of the grounds for the decision or the evidence upon which it was based;

c. Defendant has failed to inform plaintiffs sufficiently of ways in which such a decision may be challenged;

d. Defendant failed to provide plaintiffs with an opportunity for a hearing prior to suspension of benefits which are necessary to maintain life;

e. Defendant failed to afford plaintiffs their right to confront witnesses and cross-examine;

f. Defendant's procedure unfairly places an undue burden upon plaintiffs to carry the burden of reestablishing entitlement without;

1. provision for payment of witnesses and expenses;

2. notice of evidence and witnesses and information upon which basis defendant terminated, suspended or reduced benefits.

g. The termination of the benefits prior to any hearing reduces the recipients' income and removes any resources recipients might otherwise use to secure counsel, witnesses and other information.

43. The suspension of plaintiffs' benefit payments pursuant to the statute without notice or hearing denies to plaintiffs that due process of law guaranteed by the Fifth Amendment to the United States Constitution by authorizing the taking of plaintiffs' property without hearing or notice.

44. By reason of his actions, the defendant has caused the plaintiffs and all other persons similarly situated extreme hardship, suffering, and anxiety, including inadequate food and the threat of inadequate shelter and the loss of both personal and real property. Plaintiffs and all other persons similarly situated have suffered and will continue to suffer severe and irreparable injury to their health and well-being as a result of such summary, *ex parte* "adjustments" of their Title II payments by defendant until the statute and procedures described above are declared illegal or unconstitutional and their enforcement and execution in said illegal manner is enjoyed by the Court.

45. Plaintiffs have no plain, adequate, or speedy remedy at law and this suit for mandatory and declaratory relief is their only means of securing such relief.

WHEREFORE, plaintiffs pray for relief as hereinafter set forth.

THIRD CAUSE OF ACTION—DENIAL OF EQUAL PROTECTION

46. Plaintiffs repeat, reallege and incorporate herein the allegations contained in paragraphs 1-45 of this complaint.

47. Defendant has promulgated a multi-volumed *Claims Manual* which is, in essence, defendant's interpretation

of the Social Security Act and the regulations thereunder. It is a procedural manual which governs the day-to-day operations of all the Social Security Administration employees.

48. Section 5503.3 of said Claims Manual states in its relevant part that:

> 5503.3 DELAY IN WITHHOLDING BENEFITS TO RECOVER OVERPAYMENTS
>
> Before we start to adjust the overpayment against the benefits due a beneficiary, he or his payee will normally be given reasonable opportunity to contest the correctness of the determination or to establish that a basis exists for waiver or partial adjustment. The notice to the beneficiary will advise him that adjustment will be deferred 30 days. However, actual adjustment may at the discretion of the reviewing office be deferred for a longer period when the facts in a given case, including but not limited to time case is being worked, cutoff dates, mailing time, etc., indicate that a 30-day period would be Inadequate for consideration of the matter and reply by the beneficiary.
>
> The only exceptions to this rule are:
>
> (1) the overpayment is based on an annual report by the beneficiary; or . . . .
>
> [A copy of § 5503.3 is attached as Appendix E"]

49. Defendant has established two classes of recipients charged with overpayments. One class is afforded at least thirty days notice of defendant's intention to adjust the recipient's future benefits, and, in addition, is given an opportunity to contest the overpayment determination, and/or establish grounds for a waiver or partial adjustment prior to any such adjustment being made.

50. However, the members of the second class, as described in § 5503.3(1) are afforded nothing. Their benefits are simply adjusted, without notice or hearing.

51. It appears from defendant's actions that plaintiffs have been determined, without hearing, to be members of this second class.

52. In promulgating and applying this two-class system defendant has deprived plaintiffs of equal protection of the laws in violation of plaintiffs' rights to due process of the law as guaranteed by the Fifth Amendment of the United States Constitution, in that such classification is irrational, arbitrary, and capricious, and bears no rational relationship to any legitimate interest of the defendant.

53. As a result, by reason of his actions, the defendant has caused the plaintiffs and all other persons similarly situated extreme hardship, suffering, and anxiety, including inadequate food and the threat of inadequate shelter and the loss of both personal and real property. Plaintiffs and all other persons similarly situated have suffered and will continue to suffer severe and irreparable injury to their health and well-being as a result of such arbitrary, capricious and irrational classification.

WHEREFORE, Plaintiffs pray for relief as herinafter set forth.

RELIEF SOUGHT

WHEREFORE, plaintiffs respecfully pray that the Court:

1) Assume jurisdiction of this case.

2) Declare that this action be maintained as a class action pursuant to Federal Rules of Civil Procedure, Rule 23.

3. Enter a temporary restraining order and a preliminary injunction ordering defendant to:

a. restore to the named plaintiffs all the monies which have been withheld from their monthly Social Security benefits;

b. pay to all members of the class whose social security benefits are currently being adjusted, pursuant to 42 U.S.C. §§ 404(a) and (b), their regular monthly social security benefits, including all back benefits withheld unlawfully; and

c. provide plaintiffs and all other persons similarly situated with written notice and an opportunity for a hearing on the issues of overpayment, fault, hardship and equity and good conscience prior to adjusting such persons benefits.

4) Enter a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, declaring that:

(a) the defendant's practice of suspending, terminating and reducing benefits without prior notice of the reasons and opportunity for a factual hearing with right to confront witnesses and to present testimony and evidence is in violation of the Due Process Clause of the United States Constitution.

(b) Defendant's failure to determine that a recipient is with fault or that recovery would not defeat the purpose of the Social Security Act or be against equity and good conscience violates defendant's duties under 42 U.S.C. 404(b).

(c) That the defendant's practice and procedures that compel low income recipients of benefits to assume the burden of rebutting the defendant's ex parte determinations to suspend, terminate or reduce benefits and determinations to demand recovery and recoupment are unduly burdensome to plaintiffs, fundamentally unfair, and violative of the Due Process Clause of the Fifth Amendment to the United States Constitution.

(d) That the defendant's practice of granting notice and an opportunity to contest the overpayment determination, and/or establish grounds for a waiver or partial adjustment to one class of recipients while denying the same rights to a second class of recipients to which plaintiffs have been assigned is a denial of plaintiffs' rights to equal protection of the law in violation of the Due Process of the United States Constitution.

5) Issue a writ of mandamus ordering defendant, his successor in office, agents and employees to provide plaintiffs and all other persons similarly situated with written notice and an opportunity for a hearing on the issues of overpayment, fault, hardship and equity and good conscience prior to adjusting social security old age and disability insurance benefits, pursuant to 42 U.S.C. §§ 404 (a) and (b).

6. Award the plaintiffs all others similarly situated such further and alternative relief as the Court may deem just and equitable.

7. Award the plaintiffs their costs, disbursements, and attorneys fees in this action.

DATED THIS 7th day of December, 1973.

BY: /s/ Jeff Spence
JEFF SPENCE
Attorney for Plaintiffs

"EXHIBIT A"

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

[SEAL]

SOCIAL SECURITY ADMINISTRATION
PAYMENT CENTER
San Francisco, California 94101

Bureau of Retirement
and Survivors Insurance

Refer to Claim Number:

538-18-4795 A

Frances S. Biner
3015 E. Cherry St.
Seattle, WA 98122

Date: Sep. 21, 1973

THIS REFERS TO YOUR ANNUAL REPORT OF EARNINGS FOR 1972 AND YOUR WORK REPORT FOR 1973

What You Reported

Earnings in 1972—$7257

Work Status at Time You Made Report—Not Working

THE STATUS OF YOUR CLAIM AS OF SEP. 1, 1973

Total Benefits Which Should Have Been Withheld to Date

1972—$2233.60
1973—None

Total Benefits Actually Withheld

1972—None
1973—None

Amount Needed to Adjust Your Claim to Date

1972—$2233.60
1973—None

Amount Due You

1972—None
1973—None

Regular Monthly Benefit Amount

$211.50 Less Med. Ins. Premiums

A review of your report shows you received $2233.60 more than you should have for 1972. To recover this amount, your regular monthly benefits will be withheld from Sep, 1973 through Jul, 1974. You will then be due a part of your benefit for Jul, 1974 and a check for $92.90 will be sent to you shortly after Aug 2, 1974. However, your benefits can be started immediately if you refund the amount due for 1972 by check or money order made payable to the Social Security Administration. Please put your claim number on the check or money order.

The above payment of $92.90 may be reduced by any unpaid medical insurance premiums due, or increased by any premiums paid in advance at the time you are due your next payment.

The total benefits actually withheld for last year represent only the benefits withheld based on last year's estimate of earnings. It does not include any benefits withheld to recover an overpayment for an earlier year.

If you have questions about your benefits, you may get in touch with any social security office. Most questions can be handled by telephone or mail. If you visit an office, however, please take this notice with you.

/s/ Paul W. Quandt
PAUL W. QUANDT
Director of Operations

"EXHIBIT A-1"

If you believe this determination is not correct, you may request that your claim be reexamined. If you want this reconsideration, you must request it not later than 6 months from the date of this notice. You may make your request through any social security office. If additional evidence is available, you should submit it with your request.

1. How Your Work and Earnings Affect Your Benefits

   For taxable years ending after December 1972, if you earn $2,100 or less during the taxable year (usually January through December), nothing will be withheld from your benefits.

   If you earn more than $2,100 in the year, for each $2 of earnings above $2,100, $1 will be withheld from your benefits.

   However, regardless of total earnings in a year, benefits are payable for any month in which you neither earn wages of more than $175 nor perform substantial services in self-employment.

   Benefits are also payable for all months in which you are 72 or older, regardless of the amount of your earnings in months after you reach 72.

2. Report Any Significant Change in Your Work and Earnings to Any Social Security Office

   The amount of benefits payable to you for this taxable year has been determined on the basis of your work status at the time you made your annual report of earnings for last year and on the amount of earnings you expected for this year as shown on that report. You should report promptly to any social security office any change which will affect your payments, such as:

   a. If you go to work while under age 72 and expect to earn over $2,100 in the year;

   b. If you have previously reported that you expect to earn over $2,100 from work, but

      (1) You stop work, or

      (2) You do not earn over $175 for any month and you do not perform substantial services in self-employment, or

      (3) You expect to earn substantially more or less than you previously indicated for the year.

   Prompt reports enable us to make adjustments to your benefit payments when you have income from work. Delayed reports make it necessary for us to withhold benefits during periods when you may not have income from work.

   Any difference between the amount of benefits withheld based on your estimate of earnings and the amount that must be withheld on the basis of your actual earnings will be adjusted after the close of the year when you file your next annual report.

   If you have any questions about reporting, you should get in touch with any social security office.

3. Information About Medical Insurance Premiums

   a. *When monthly social security benefits are being paid to you—*

      If your premiums are paid up-to-date, 1 month's premium will be withheld from your benefit check each month.

      If you owe premiums for last year, the full amount owed will be withheld from your next check.

      If you owe premiums only for this year, only 1 month's premium will be withheld from your next check and at the end of the year we will make an adjustment for other premiums owed.

      Any excess premiums paid in advance will be refunded to you in a separate check.

b. *When monthly social security benefits are not currently being paid to you—*

If this is the first time your benefits are being withheld this year, you will be billed for any premiums you owe.

If your benefits were withheld earlier this year, we will not bill you now. At the end of the year, we will make an adjustment for any premiums due.

4. Information When You Have Been Overpaid

Under social security law, any overpayment must be withheld from benefits or paid back unless *both* of the following are true:

a. The overpayment wasn't your fault in any way and you cashed the check(s) because you thought they were correct, *and*

b. You couldn't meet your necessary living expenses if you had to pay back the overpayment or have it withheld from your social security benefits; or it would be unfair for some other reason.

To decide whether repayment would cause you financial hardship, we will need a statement of your assets, and monthly income and expenses. If you think you meet both conditions or you wish to repay the overpayment by installments or have it withheld from benefits at a reduced rate over a longer period, call, write, or visit any social security office.

"EXHIBIT B"

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

[SEAL]

October 9, 1973

Refer to:

538-18-4795-A

Frances S. Biver
3015 E. Cherry St.
Seattle, WA 98122

Dear Mr. Biver:

Under social security law, an overpayment must be withheld from benefits or paid back unless both of the following are true:

1. The overpayment wasn't your fault in any way and you cashed the check(s) because you thought they were correct, and

2. You couldn't meet your necessary living expenses if you had to pay back the overpayment or have it withheld from your social security benefits; or it would be unfair for some other reason.

To decide whether repayment would cause you financial hardship, we will need a statement of your assets, and monthly income and expenses.

If you think you meet both conditions, or if withholding the entire amount of your monthly benefits will cause you financial hardship, please complete and return to this office the enclosed forms. If you need assistance in completing the forms, please feel free to call this office.

Sincerely,

/s/ A. Bennett db
A. BENNETT
Claims Representative

AB/db
Enclosures

"EXHIBIT C-1"

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
[SEAL]
PAYMENT CENTER
Kansas City, Missouri 64108

October 3, 1973

Refer to Claim Number
460-14-2600-A

Bureau of Retirement
and Survivors Insurance

Fannie M. Buffington
1525 26 Ave. E.
Seattle, WA 98102

Information about your social security benefits is shown below:

1. Amount of your next check $11.30
2. Covers benefits due through October 1973
3. Will be sent about November 3, 1973
4. Amount of regular check thereafter $89.90

Based upon the insured individual's earnings, it has been determined that you have been overpaid in the amount of $78.60. Therefore, an adjustment is being made in your benefits to withhold the additional amount necessary.

If you are enrolled in the medical insurance program, please see item 3 on the back of this notice.

Please notify any social security office promptly of an event which might affect the payment of benefits. There is an explanation on the back of this notice of how work and earnings affect benefit payments.

If you have questions about your claim, you may get in touch with any social security office. Most questions can

be handled by telephone or mail. If you visit an office, however, please take this notice with you.

Sincerely yours,

/s/ R. W. Jacobson
R. W. JACOBSON
Director of Operations

"EXHIBIT C-2"

If you believe this determination is not correct, you may request that your claim be reexamined. If you want this reconsideration, you must request it not later than 6 months from the date of this notice. You may make your request through any social security office. If additional evidence is available, you should submit it with your request.

1. How Your Work and Earnings Affect Your Benefits

   For taxable years ending after December 1972, if you earn $2,100 or less during the taxable year (usually January through December), nothing will be withheld from your benefits.

   If you earn more than $2,100 in the year, for each $2 of earnings above $2,100, $1 will be withheld from your benefits.

   However, regardless of total earnings in a year, benefits are payable for any month in which you neither earn wages of more than $175 nor perform substantial services in self-employment.

   Benefits are also payable for all months in which you are 72 or older, regardless of the amount of your earnings in months after you reach 72.

2. Report Any Significant Change in Your Work and Earnings to Any Social Security Office

   The amount of benefits payable to you for this taxable year has been determined on the basis of your work status at the time you made your annual report of earnings for last year and on the amount of earnings you expected for this year as shown on that report. You should report promptly to any social security office any change which will affect your payments, such as:

   a. If you go to work while under age 72 and expect to earn over $2,100 in the year;

   b. If you have previously reported that you expect to earn over $2,100 from work, but

      (1) You stop work, or

      (2) You do not earn over $175 for any month and you do not perform substantial services in self-employment, or

      (3) You expect to earn substantially more or less than you previously indicated for the year.

   Prompt reports enable us to make adjustments to your benefit payments when you have income from work. Delayed reports make it necessary for us to withhold benefits during periods when you may not have income from work.

   Any difference between the amount of benefits withheld based on your estimate of earnings and the amount that must be withheld on the basis of your actual earnings will be adjusted after the close of the year when you file your next annual report.

   If you have any questions about reporting, you should get in touch with any social security office.

3. Information About Medical Insurance Premiums

   a. *When monthly social security benefits are being paid to you—*

      If your premiums are paid up-to-date, 1 month's premium will be withheld from your benefit check each month.

      If you owe premiums for last year, the full amount owed will be withheld from your next check.

      If you owe premiums only for this year, only 1 month's premium will be withheld from your next check and at the end of the year we will make an adjustment for other premiums owed.

      Any excess premiums paid in advance will be refunded to you in a separate check.

b. *When monthly social security benefits are not currently being paid to you—*

If this is the first time your benefits are being withheld this year, you will be billed for any premiums you owe.

If your benefits were withheld earlier this year, we will not bill you now. At the end of the year, we will make an adjustment for any premiums due.

4. Information When You Have Been Overpaid

Under social security law, any overpayment must be withheld from benefits or paid back unless *both* of the following are true:

a. The overpayment wasn't your fault in any way and you cashed the check(s) because you thought they were correct, *and*

b. You couldn't meet your necessary living expenses if you had to pay back the overpayment or have it withheld from your social security benefits; or it would be unfair for some other reason.

To decide whether repayment would cause you financial hardship, we will need a statement of your assets, and monthly income and expenses. If you think you meet both conditions or you wish to repay the overpyament by installments or have it withheld from benefits at a reduced rate over a longer period, call, write, or visit any social security office.

STAN PITKIN
United States Attorney
CHARLES F. MANSFIELD
Assistant United States Attorney
1012 United States Courthouse
Seattle, Washington 98104
(206) 442-7970

CERTIFICATE OF MAILING

I certify that I mailed a copy of the foregoing document to which this certificate is attached, to the attorneys of record of plaintiffs, on the 11th day of March, 1974.

By /s/ L. Jones
United States Attorney

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. 734-73C2

[Filed Mar. 11, 1974]

FANNIE BUFFINGTON and FRANCES BINER, individually and on behalf of ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

—*vs*—

CASPAR WEINBERGER, individually and in his capacity as Secretary of the Department of Health, Education, and Welfare, DEFENDANT

ANSWER

COMES NOW the defendant Caspar W. Weinberger, as Secretary of the Department of Health, Education, and Welfare of the United States of America and, in

answer to plaintiffs' complaint, admits, denies, and alleges as follows:

1. Defendant denies that jurisdiction exists to consider this case as plaintiffs allege in parts (a), (b), and (c) of paragraph 1 of the complaint but rather, defendant states that jurisdiction over Social Security matters lies exclusively under section 205(g) of the Social Security Act, 42 U.S.C. § 405(g).

2. Answering the allegations contained in paragraph 2 of the complaint, defendant does not have sufficient knowledge to respond to the allegations concerning plaintiffs' current residence, however, defendant admits that plaintiff Biner has been awarded a retirement insurance benefit check for every month since she stopped working effective January 1973 and that plaintiff Buffiington has similarly been awarded retirement insurance benefits from September 1969 to the present.

3. With respect to the allegations contained in paragraphs 3 through 9 of the complaint, defendant denies that plaintiffs represent an ascertainable class of individuals for whom the granting of final injunctive and declaratory relief would be appropriate; defendant denies that plaintiff is entitled to any of the relief sought in paragraphs 3 through 9; and defendant denies the allegations in paragraph 3 through 9.

4. Defendant admits the allegations contained in paragraphs 10, 14, and 19.

5. Defendant lacks sufficient information or knowledge to answer the allegations contained in paragraph 11 with regard to the amount of time plaintiff Biner has been a resident of Seattle, Washington, or the state of her financial resources in 1973.

6. Defendant admits the allegations contained in paragraph 12, except to state that plaintiff Biner received a benefit check in the amount of $1,809.00 which represented benefits for January through August 1972 and that she has received additional benefit checks through the date of this civil action. Furthermore, plaintiff Biner is currently entitled to and is receiving $184.20 per month after deducting $50.00 per month because of an overpayment and $6.30 per month for her Medicare premium.

7. Defendant admits the allegations contained in paragraph 13 with the exception that defendant denies that plaintiff Biner did not receive retirement insurance benefits from September 1973 to the date of the filing of the civil action since plaintiff's social security records show that she has continued to receive benefit checks through the present.

8. Defendant admits the allegations contained in paragraph 15 of the complaint except to state that reconsideration determinations in cases involving retirement insurance benefits are decided in the Social Security Program Centers.

9. Answering the allegations contained in paragraphs 16 and 17 defendant states that plaintiff Buffington was receiving retirement and wife's insurance benefits until November 1973 and that her husband was receiving retirement insurance benefits. Defendant denies the allegations with respect to the amount of monthly benefits since the amounts changed from the time they were first received due to statutory benefit increases. Further, defendant states that plaintiff Buffington was notified by letter dated October 3, 1973 that based on her husband's earnings, an overpayment had occurred and that an adjustment in her November 3, 1973 check would be necessary.

10. With respect to the allegations contained in paragraph 18 of the complaint, plaintiff's social security file contains no evidence of a visit to the district office in October 1973, therefore, defendant denies the allegations in this paragraph.

11. With respect to the allegations contained in paragraph 20 of the complaint, defendant admits only that on or about November 6, 1973, plaintiff Buffington questioned the overpayment notice and the district office sought verification of the reasons for the overpayment.

12. Defendant does not have sufficient information at the present to respond to the allegations contained in paragraph 21 to the complaint and, therefore neither admits nor denies the same.

13. Answering the allegations in paragraph 22 of the complaint, defendant denies that plaintiffs were not notified of the reasons underlying the determination of overpayments in their respective cases but states that the proper procedures preliminary to adjustment of benefits were followed. Defendant admits that these procedures do not provide for a full *de novo* oral hearing prior to adjustment.

14. Answering the allegations contained in paragraph 23, defendant states all of the procedures to which plaintiffs were entitled with regard to overpayments have been afforded them in complete accordance with 204(a) and (b) of the Social Security Act, 42 U.S.C. 404(a) and (b).

15. Defendant reasserts his answers to paragraphs 1 through 23 of plaintiffs' complaint in response to the allegations contained in paragraph 24.

16. Defendant denies that he has violated his statutory duty as alleged by the plaintiffs in paragraph 25 of the complaint.

17. Defendant denies that plaintiffs' interpretation of section 204(b) of the Social Security Act, 42 U.S.C. 404(b) contained in paragraph 26 is correct.

18. With respect to the allegations contained in paragraph 27 of the complaint, defendant maintains that all necessary findings and determinations in accordance with the relevant procedures were made prior to the adjustment of plaintiffs' benefits.

19. Defendant denies the allegations contained in paragraphs 28, 29, and 30 and further states that beneficiaries such as the plaintiffs herein are given every opportunity prior to adjustment of benefits (short of a full *de novo* oral hearing) to present evidence relevant to the existence and recovery of an overpayment and whether or not the overpayment should be waived.

20. Answering the allegations contained in paragraphs 31 and 32 of the complaint, defendant denies the allegations therein and denies that the notification and recovery procedures in overpayment cases imposes an undue and unfair burden on the plaintiffs without providing them a fair opportunity to rebut the evidence indicating the existence of an overpayment.

21. Defendant denies that the above-mentioned overpayment procedures are as plaintiff describes them in paragraph 33 and defendant further denies that these procedures result in arbitrary and capricious decisions which are violative of the statutory duty owed to the plaintiffs.

22. Defendant denies the allegations in paragraph 34 of the complaint and further states that jurisdiction is exclusive under section 205(g) of the Social Security Act, 42 U.S.C. 405(g).

23. Defendant reasserts his answers to the allegations contained in paragraphs 1 through 34 of the complaint in responding to paragraph 35 of the complaint.

24. Answering the allegations contained in paragraphs 36 and 37 of the complaint, defendant admits that plaintiffs are entitled to social security benefits if they meet the requirements of section 202 of the Social Security Act, 42 U.S.C. 402, but only to the extent that these benefits are not subject to deductions under section 203 of the Social Security Act, 42 U.S.C. 403; defendant denies that plaintiffs are entitled to benefits as alleged in paragraph 37.

25. With respect to the allegations contained in paragraph 38, defendant admits only that the adjustment to plaintiffs' benefits took place in accordance with the provisions contained in section 204(a) of the Social Security Act, 42 U.S.C. 404(a); defendant denies plaintiffs' benefits have been terminated.

26. Defendant admits the allegations contained in paragraphs 39 and 40.

27. Defendant admits the allegations contained in paragraph 41 of the complaint except to state plaintiffs' benefits were not adjusted until after plaintiffs had been given notice of the impending adjustment and an opportunity to rebut the reasons upon which the adjustments are based and an opportunity to assert and establish the appropriateness of waiver of recovery; furthermore, defendant denies the determinations were *ex parte*.

28. Answering the allegations contained in paragraphs 42 and 43 to the complaint defendant denies that the procedures employed by the Secretary in cases involving overpayments of benefits deny the plaintiffs their right to due process under the Fifth Amendment to the United States Constitution.

29. Defendant denies the allegations in paragraphs 44 and 45.

30. Answering paragraph 46, defendant reasserts his answers to paragraphs 1 through 45 of the complaint.

31. Defendant admits the allegations contained in paragraph 47 and 48 except defendant states that the provisions of the *Claims Manual* of the Social Security Administration are issued in strict compliance with the provisions of the Social Security Act.

32. Defendant denies the allegations contained in paragraphs 49, 50, 51, 52, and 53.

AFFIRMATIVE DEFENSE

33. For his affirmative defense defendant alleges that plaintiffs' complaint fails to state a claim upon which relief can be granted in that plaintiffs have failed to meet the jurisdictional requirements of section 205(g) of the Social Security Act, 42 U.S.C. 405(g). Section 205(g) is the sole basis for jurisdiction in cases arising under Title II of the Social Security Act. Furthermore, defendant states that plaintiffs have failed to meet their burden of proof in establishing jurisdiction as alleged under Title 28 U.S.C. §§ 1331(a), 1361, 1364(a)(2), and 5 U.S.C. § 701 et seq.

WHEREFORE, defendant prays that this Court:

1. Deny jurisdiction of this case.
2. Deny plaintiffs' request that this case be certified as a class action.
3. Deny plaintiffs' request for a temporary restraining order and a preliminary injunction.
4. Deny plaintiffs' request for a declaratory judgment.
5. Deny plaintiffs' request for issuance of a writ of mandamus.

6. Dismiss this action for failure to state a claim upon which relief can be granted and/or lack of jurisdiction over the subject matter.
7. Grant defendant alternative relief in the form of summary judgment in his favor.
8. Award defendant costs and such other relief as the Court deems just and equitable.

DATED this 11th day of March, 1974.

STAN PITKIN
United States Attorney

/s/ Charles F. Mansfield
CHARLES F. MANSFIELD
Assistant United States Attorney

JEFF SPENCE
SEATTLE LEGAL SERVICES CENTER
5308 Ballard Avenue N.W.
Seattle, Washington 98107
Phone: (206) 789-2450

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 34-73C2

[Filed Dec. 11, 1973]

FANNIE BUFFINGTON and FRANCES BINER, individually and on behalf of ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

vs.

CASPER WEINBERGER, individually and in his capacity as Secretary of the Department of Health, Education and Welfare, DEFENDANTS

MOTION TO DECLARE CLASS ACTION

COMES NOW Jeff Spence, attorney for plaintiffs, and moves the Court for an Order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure declaring that this action may properly proceed as a class action pursuant to Rule 23(a) and 23(b)(2).

The members of the class are all Social Security recipients, who are being or will be subjected to termination, suspension or reduction of their Social Security benefits pursuant to 42 U.S.C. §§ 404(a) and (b) without constitutionally adequate notice of the grounds for such action, and without a prior oral hearing on disputed issues relating to such action.

DATED this 11th day of December, 1973.

/s/ Jeff Spence
JEFF SPENCE
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. 734-73C2

[Filed Apr. 8, 1974]

FANNIE BUFFINGTON and FRANCES BINER, individually and on behalf of ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

vs.

CASPAR WEINBERGER, individually and in his capacity as Secretary of the Department of Health, Education and Welfare, DEFENDANTS

ORDER GRANTING CLASS ACTION

This action having come on regularly for hearing before this Court on plaintiff's motion for declaration of class action, plaintiffs being represented by their attorney, Jeff Spence, and defendant being represented by his attorneys Charles Mansfield and Richard Wetmore, and the Court having considered the arguments of counsel and the file herein, now finds that

FINDINGS

1. The class is composed of all individuals eligible for Social Security benefits pursuant to 42 U.S.C. Section 402 whose benefits have been or will be reduced, suspended, terminated or otherwise adjusted without notice and opportunity for a prior hearing pursuant to Defendant's administrative interpretation of 42 U.S.C. Section 404.

2. The class is so numerous that joinder of all members is not practicable.

3. There are questions of law and fact common to the class.

4. The claims of the representative parties are typical of the claims of the members of the class.

5. The representatives of the class will fairly and adequately protect the members of the class.

6. Defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

ORDER

On the basis of the foregoing findings, It is Ordered That:

1. The action shall be maintained as a class action pursuant to F.R.Civ.P. Rule 23(b)(2);

2. The class shall be composed of all individuals eligible for Social Security benefits pursuant to 42 U.S.C. Section 402 whose benefits have been or will be reduced, suspended, terminated or otherwise adjusted without notice and opportunity for a prior hearing pursuant to Defendant's administrative interpretation of 42 U.S.C. Section 404.

DATED: April 4, 1974.

/s/ Morell E. Sharp
MORELL E. SHARP
United States District Judge

Approved as to form, Notice of Presentation Waived:

/s/ Charles F. Mansfield
CHARLES MANSFIELD
Asst. United States Attorney
Attorney for Defendant

Presented by:

/s/ Jeff Spence
JEFF SPENCE
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Civil Action No. 734-73C2

[Filed Apr. 23, 1974]

FANNIE BUFFINGTON AND FRANCES BINER, individually and on behalf of all others similarly situated, PLAINTIFFS

v.

CASPAR WEINBERGER, Secretary of Health, Education, and Welfare, DEFENDANT

PLAINTIFFS' INTERROGATORIES TO DEFENDANT; FIRST SET

Pursuant to the provisions of Rule 33 of the Federal Rules of Civil Procedure as amended, and upon information provided by the defendants, and on the basis of information provided by the Department of Health, Education, and Welfare, the answers to the plaintiffs' interrogatories are based upon the best information available. The "Claims Manual" references herein are to the Social Security Administration Claims Manual which is available for inspection by the public at any social security district office.

Interrogatory #1

Please provide the following information relating to Mrs. Frances Biner's application for retirement benefits:

(a) The date and location of the initial application;

A. Mrs. Frances Biner filed her application for retirement insurance benefits in Seattle, Washington, on October 5, 1970.

(b) The name of the Social Security Administration employee who handled her application; and

A. All actions taken in processing claims are done in the performance of the employees' duties on behalf of the Secretary of Health, Education, and Welfare.

(c) Any application forms, income reports, estimated earnings reports, and any other reports, and any other reports or forms completed by Mrs. Biner as part of the application process;

A. See Exhibit A for a photocopy of the application filed by Mrs. Biner which includes an estimate of her earnings. See Exhibit B for the report Mrs. Biner signed on August 28, 1973, regarding her earnings for 1972 and estimated earnings for 1973.

Interrogatory #2

Please provide the following information relating to the determination of Mrs. Biner's eligibility for benefits:

(a) The date of her retirement;

A. Mrs. Biner was found entitled to benefits effective November 1970 based on her date of birth, November 20, 1905. She was paid no benefits until she notified the Seattle office in November 1972 that she would not earn over $1,680 in 1972.

(b) How the Social Security Administration was advised of this date.

[Include any writing in Mrs. Biner's files which relates to your answer.]

A. This notification was done by telephone.

(c) The date she became entitled to benefits;

A. Mrs. Biner was found entitled to benefits effective November 1970. She was actually paid benefits for months beginning in January 1972.

(d) How this date was determined;

A. Sections 203(b) and (f) of the Social Security Act (42 U.S.C. 403(b) and (f)) provide for deductions from payment of benefits on account of work after the date of entitlement. In 1972, those sections provided that no deductions on account of work were applicable if a beneficiary earned less than $1,680 in the year. Mrs. Biner

notified the Seattle district office in November 1972 that she would not earn over $1,680 in 1972.

(e) The amount of her first check;

A. $1,809.

(f) How this amount was determined;

A. Mrs. Biner's monthly benefit rate effective January 1972 was $174.50 and effective September 1972 it was $209.40. Since she stated she was not earning over $1,680 in 1972, she was paid for 8 months at $174.50 and 2 months at $209.40 in this first check. This totals $1,814.80, and $5.80 was withheld for her premium payment for supplementary medical insurance.

(g) Who made that determination;

A. This determination was made by the Western Program Center in San Francisco, California.

(h) The amount of her regularly monthly benefits; and

A. Mrs. Biner's original benefit amount effective November 1970 was $132.30 based on her earnings through 1969, using her 11 highest years of earnings. Because of general increases and amendments to the Act and because Mrs. Biner had additional earnings her monthly benefit amount has been increased accordingly. Her present full monthly benefit amount before payment of medical premiums is $250.30 (including a general 7 percent increase in benefits first reflected in checks received in April 1974).

(i) How that amount was determined.

A. See (h) above.

Interrogatory #3

Please provide copies of all reports, forms and other written statements submitted by Mrs. Biner to the Social Security Administration which were not furnished as part of your answer to Interrogatories #1 and #2.

A. None.

Interrogatory #4

Please indicate whether or not Mrs. Biner was requested to submit such reports, forms, and writings, and, if so, for what purpose.

A. Please see item 16 on Exhibit A. A booklet was also mailed to Mrs. Biner with her Certificate of Social Insurance Award. See Exhibit C. Note particularly the explanation "How Earnings From Work Affect Benefits" beginning on page 10 and "Returning Benefit Checks Not Due" on page 31. Exhibit D is the back of the notice sent to a beneficiary with the explanation of her first check. Exhibit E is the front of the notice sent to explain the reason for starting payments of benefits.

Interrogatory #5

Please state the amount of monthly benefits to which Mrs. Biner was entitled, but for the adjustment, for each month beginning with January, 1973, and up to and including March, 1974.

A. Beginning January 1973, Mrs. Biner's monthly benefit rate was $234.20 minus $6.30 for medical insurance premium, or $227.90. Effective for the month of March 1974 (checks received April 3, 1974), there was a general 7 percent increase in benefits and Mrs. Biner's benefits were raised to $250.30.

Interrogatory #6

Please state the amount she actually received for each of those months.

A. Our records indicate Mrs. Biner was paid $177.90 for each month January 1973-February 1974 and should have received $194 for March 1974.

Interrogatory #7

What is the basis for the alleged overpayment to Mrs. Biner? In your answer please state with as much detail and specificity as possible the process by which this determination was made. Please attach any and all documents which relate to this determination. Your answer should include the date on which that determination was made.

A. The overpayment to Mrs. Biner was discovered when it was learned through a report by her employer to the Bureau of Data Processing of the Social Security Administration that she had earned $7,257.34 in 1972. The possibility of additional earnings, earnings in excess of the $1,680 she had previously reported as earning in 1972, was learned by the Western Program Center when they received a notice from the Bureau of Data Processing dated June 27, 1973, that Mrs. Biner was entitled to an increase in her benefits beginning January 1973 based on "Delayed Retirement Credits". Because Mrs. Biner had not filed an annual report of earnings as required by item 16 in Exhibit A and page 14 of Exhibit C, one was solicited from her. She completed it August 28, 1973 (see Exhibit B) and reported that she had, in fact, earned $7,257.34 in 1972, and had earned over $140 in each month of 1972. It was then determined that Mrs. Biner had been overpaid $2,233.60 in 1972. The basis for this determination are the provisions in sections 203(b) and (f) of the Social Security Act (42 U.S.C. 403(b) and (f)). These provisions are explained in Regulations No. 4, sections 404.415, 404.416, and 404.434-404.437. Procedures to be followed in administering the work retirement test are contained in Claims Manual section 5100ff.

Interrogatory #8

Please provide the following information relating to the notice of overpayment given to Mrs. Biner:

(a) The date such notice was sent to Mrs. Biner;

A. September 21, 1973.

(b) The name of the person who prepared the notice;

A. See answer to Interrogatory #1(b).

(c) A copy of the notice; and

A. See "Exhibit A" attached to the complaint.

(d) The reason or reasons why Mrs. Biner was not given more advance notice, i.e. 30 or even 60 days.

A. Mrs. Biner was not provided advance notice because prior to January 1974 an annual report submitted by the beneficiary was an exception to the policy that adjustment of an overpayment would be deferred at least 30 days to give the overpaid beneficiary reasonable opportunity to contest the accuracy of the determination of overpayment or to establish that a basis exists for waiver of adjustment or partial adjustment. (Claims Manual sections T5105, 5503.3.)

Interrogatory #9

What opportunity was afforded Mrs. Biner to contest the determination that an overpayment had occurred, prior to the adjustment of her October, 1973, benefits?

A. See the first paragraph of "Exhibit A-1" attached to the complaint. It reads:

> "If you believe this determination is not correct, you may request that your claim be reexamined. If you want this reconsideration, you must request it not later than 6 months from the date of this notice. You may make your request through any social security office. If additional evidence is available, you should submit it with your request."

Interrogatory #10

42 U.S.C. § 404(b) reads as follows:

> (b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

Please state:

(a) Who made the determination that Mrs. Biner was at fault;

A. See answer to Interrogatory #1(b).

(b) When that determination was made;

A. November 19, 1973.

(c) What "fault" Mrs. Biner committed;

A. Mrs. Biner accepted three checks representing payment of benefits for 1972. She had not been paid for any months beginning November 1970 because of her work and earnings and should have known that her 1972 work and earnings also precluded payment. She should have questioned issuance of these checks particularly since she indicates that she had not requested the payments but had requested payments beginning January 1973 based on her retirement in December 1972. (Regulations No. 4, 404.507 and 404.511(a) and CM 5541, 5547.1-5547.4.)

(d) What opportunity was afforded Mrs. Biner to present evidence and testimony on the issue of "fault" prior to the "adjustment"; and

A. None because prior to January 1974 such opportunity was not available in situations where adjustment was the consequence of an annual report of earnings submitted by the beneficiary.

(e) The source(s) of defendants' definition of "fault". [Please attach copies of any applicable regulations, claims manual provisions, memoranda, or other documents.]

A. See Exhibit F.

Interrogatory #11

Again referring to 42 U.S.C. § 404(b), please state:

(a) Who made the determination that the adjustment [total suspension] of Mrs. Biner's benefits would not defeat the purposes of the Social Security Act;

A. Since Mrs. Biner was found at fault, waiver of adjustment was not possible. Therefore, a determination that adjustment would not defeat the purposes of the Social Security Act was not necessary (CM 5541).

(b) When that determination was made;

A. See (a) above.

(c) Prior to the adjustment, what opportunity was afforded Mrs. Biner to contest the finding that the "adjustment" did not defeat the purposes of the Act; and

A. See answer to Interrogatory #10(d).

(d) The sources(s) of defendant's definition of "defeat the purposes of this subchapter". [Please attach copies of any applicable regulations, claims manual provisions, memoranda, or other documents.]

A. See Exhibit G.

Interrogatory #12

Again referring to 42 U.S.C. § 404(b), please state:

(a) Who determined that the "adjustment" of Mrs. Biner's benefits was not "against equity and good conscience";

A. Since Mrs. Biner was found at fault, waiver of adjustment was not possible. Therefore, a determination that adjustment would not be against equity and good conscience was not necessary (CM section 5541).

(b) The date that determination was made;

A. See (a) above.

(c) Prior to the adjustment, what opportunity was afforded Mrs. Biner to contest the finding that the "adjustment" was not against equity and good conscience; and

A. See answer to Interrogatory #10(d).

(d) The source(s) of defendant's definition of "against equity and good conscience." [Please attach copies of any applicable regulations, claims manual provisions, memoranda, or other documents.]

A. See Exhibit G.

Interrogatory #13

Please provide the following information with regard to Mrs. Biner's request for reconsideration of the overpayment decision:

(a) The date such request was made;

A. November 28, 1973, and December 17, 1973.

(b) The name and title of the person who makes the decision on her request;

A. Please see answer to Interrogatory #1(b).

(c) The reason or reasons why Mrs. Biner has not been notified of a decision on her request; and

A. Notice that upon redetermination the denial of waiver of adjustment of the overpayment was affirmed was sent to Mrs. Biner (and a copy to Mr. Spence) on April 8, 1974.

(d) Copies of all the papers in Mrs. Biner's files relating to her request for said reconsideration.

A. See Exhibits H and I.

Interrogatory #14

Please provide the following information with regard to Mrs. Biner's request for a reconsideration of the decision to suspend "only" $50.00 of her benefits per month:

(a) The date such request was made;

A. Mrs. Biner has contended that there was no overpayment (and thus there should be no adjustment) in her requests for reconsideration of November 28, 1973 and December 14, 1973, but has not specifically disputed the rate of adjustment. Although the determination denying waiver of adjustment of an overpayment represents an initial determination which a beneficiary may request reconsideration of (CM section 7105.3(1)), the method of recovery (or rate of adjustment) is not such an initial determination. (CM sections 5519(b) and 7105.5 and (c)).

(b) The name and title of the person who makes the decision on her request;

A. See answer to Interrogatory #1(b).

(c) The reason or reasons why Mrs. Biner has not been notified of a decision on her request;

A. See (a) above.

(d) Copies of all the papers in Mrs. Biner's files relating to her request for said reconsideration; and

A. Not applicable.

(e) The basis for this decision, i.e., why $50.00 rather than $10.00 or $150.00.

A. Where an individual is at fault in causing an overpayment, partial adjustment must be set at a rate which will allow recoupment of the overpayment within a 36-month period (CM section 5517.5). $50 was an approximation. The balance of the overpayment in November 1973, when partial adjustment was initiated, was $1,583.70, and to recoup this amount in a 36-month period required a monthly withholding of at least $43.98 ($44 is the least which could be withheld). Actually where a rate of adjustment has not been suggested by the beneficiary, the withholding may be as much as the beneficiary's full monthly benefit.

Interrogatory #15

Please provide the following information with regard to Mrs. Biner's request for a reconsideration of the decision that she owes money for unpaid medical insurance premiums.

(a) The date such request was made;

A. Mrs. Biner's claims folder does not reflect a request for reconsideration of this issue.

(b) The name and title of the person who makes the decision on her request;

A. Not applicable.

(c) The reason or reasons by Mrs. Biner has not been notified of a decision on her request; and

A. The complaint filed by plaintiff's attorney makes no mention of a request for a reconsideration regarding unpaid medical insurance premiums. Her claims folder does not reflect any actions in this area.

(d) Copies of all papers in Mrs. Biner's files relating to her request for said reconsideration.

A. None.

Interrogatory #16

Claims Manual section 5503.5 provides in its pertinent part that:

> Where action has already been taken to recoup on overpayment, i.e., §§ 5503.3(1) or (2) above, or where the beneficiary did not respond until after the deferral period, if the beneficiary requests either waiver, partial adjustment, or reconsideration of the overpayment determination and benefits are otherwise payable, the DO will immediately notify the reviewing office by means of Form SSA-2521 to initiate payment of benefits effective with the current operating month until such time as the issue has been resolved.

Please state:

(a) The date the DO notified the reviewing office by means of Form SSA-2521 on behalf of Mrs. Biner;

A. The instructions in CM section 5503.5 were not followed. The DO inadvertently did not use form SSA-2521.

(b) Why Mrs. Biner's benefits have not been restored pending the resolution of the disputed issues.

A. Reviewing office failed to restore the full benefit when request for reconsideration was received since the procedures in CM section 5503.5 were not followed. However the determination to adjust was affirmed on reconsideration. Therefore a restoration of benefits pending reconsideration would have resulted in an increased overpayment to Mrs. Biner. Restoration of the full monthly benefit would not be appropriate at this time.

NOTE: There are two Interrogatories number 16. The first one referred to Mrs. Biner. The following #16 refers to Mrs. Buffington.

Interrogatory #16

With regard to Mrs. Fannie Buffington please state the amount of Social Security benefits she was entitled to receive (without considering any overpayment adjustments) for the months of September, October, November, and December, 1973, and January, 1974.

A. For each of the months of September 1973, October 1973, November 1973, December 1973, and January 1974, Mrs. Buffington was entitled to a benefit amount of $96.20. After her monthly medical insurance premium of $6.30 was withheld, the amount due would be $89.90.

Interrogatory #17

Please state the amounts she actually received for those months.

A. Mrs. Buffington was paid benefits *for* the months of September 1973 through January 1974 as follows:

09/73—$89.90 (pair about October 3, 1973)

10/73— 11.30 (paid about November 3, 1973)

11/73— 89.90 (paid about December 3, 1973)

12/73— 89.90 (paid about January 3, 1974)

01/74— 89.90 (paid about February 3, 1974)

Interrogatory #18

If there is any discrepancy for any of the months in question please explain such discrepancy.

A. An overpayment of $78.60 was withheld from Mrs. Buffington's benefit amount of $89.90 for October 1973. She received payment of $11.30 for October 1973 about November 3, 1973.

Interrogatory #19

How was Mrs. Buffington's September, 1973, benefit level established?

A. For September 1973, Mrs. Buffington was entitled to a retirement insurance benefit of $80.50 and a wife's benefit of $15.70 or a combined benefit of $96.20. Her medical insurance premium of $6.30 reduced the benefit payment to $89.90.

Interrogatory #20

What is the basis for the alleged overpayment to Mrs. Buffington? In your answer please state with as much detail and specificity as possible the process by which this determination was made. Please attach any and all documents which relate to this determination. Your answer should include the date on which that determination was made.

A. Mr. Buffington filed an annual earnings report for 1972 on September 4, 1973. It showed yearly earnings of $3,240 for 1972 and wages over $140 a month for January through September of that year. Based on these earnings and services, Mr. Buffington's retirement insurance benefit was subject to a deduction of $134.70 a month for January 1972 through June 1972, and $73.20 for July 1972. In addition, Mrs. Buffington's wife's benefit was subject to a deduction of $13.10 a month for January 1972 through June 1972. As a result of these deductions, Mr. Buffington was overpaid $881.40 and Mrs. Buffington was overpaid $78.60. The determination of overpayment was made on September 22, 1973.

NOTE: Pages 17 and 18 of the Interrogatories from the plaintiff repeat the use of the numbers 19 and 20.

Interrogatory #19

Please provide the following information relating to the notice of overpayment given to Mrs. Buffington:

(a) The date such notice was sent to Mrs. Buffington;

A. Notice of overpayment was mailed to Mrs. Buffington on October 3, 1973. The notice indicated the overpayment would be withheld from her next benefit (October 1973 benefit) payable about November 3, 1973.

(b) The name of the person who prepared the notice;

A. See answer to Interrogatory #1 (b).

(c) A copy of the notice; and

A. See "Exhibit C-1" attached to complaint.

(d) The reason or reasons why Mrs. Buffington was not given more advance notice, i.e., 30 or even 60 days.

A. Prior to January 1974 (Transmittal Sheet No. 3156, sections T5101-T5105) an annual report of earnings submitted by the beneficiary was an exception to the policy that adjustment of an overpayment would be deferred at least 30 days to give the overpaid beneficiary reasonable opportunity to contest the accuracy of the determination of overpayment or to establish that a basis existed for waiver of adjustment or partial adjustment. Mrs. Buffington was nevertheless given approximately 30 days notice of the proposed overpayment adjustment and thus, even though the new procedures were not yet promulgated, was afforded the same advance notice now provided for by these procedures.

Interrogatory #20

What opportunity was afforded Mrs. Buffington to contest the determination that an overpayment had occurred prior to the adjustment of her November, 1973, benefits?

A. Mrs. Buffington was given approximately 27 days notice (via notice of overpayment dated October 3, 1973) that the overpayment would be withheld from her October 1973 benefit that she should have received about November 3, 1973.

Interrogatory #21

42 U.S.C. § 404(b) reads as follows:

> (b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

Please state:

(a) Who made the determination that Mrs. Buffington was at fault;

A. Mrs. Buffington did not request consideration of waiver of recovery of the overpayment of $78.60. Consequently, a determination was not made as to whether or not she was at fault in causing the overpayment.

(b) When that determination was made;

A. Not applicable. See (a) above.

(c) What "fault" Mrs. Buffington committed;

A. Not applicable. See (a) above.

(d) What opportunity was afforded Mrs. Buffington to present evidence and testimony on the issue of "fault" prior to the "adjustment".

A. The claims record indicates that on October 10, 1973, Mrs. Buffington asked the Seattle, Washington, Social Security Office for an explanation of the overpayment. Evidence and testimony on the issue of "fault" has not been presented.

(e) The source(s) of defendants' definition of "fault". [Please attach copies of any applicable regulations, claims manual provisions, memoranda, or other documents.]

A. Not applicable. See (a) and (d) above.

Interrogatory #22

Again referring to 42 U.S.C. § 404(b), please state:

(a) Who made the determination that the adjustment [total suspension] of Mrs. Buffington's benefits would not defeat the purposes of the Social Security Act;

A. A determination was not made as to whether or not adjustment of Mrs. Buffington's overpayment would

defeat the purpose of title II of the Social Security Act. Consideration of waiver of adjustment of the overpayment was not requested.

(b) When that determination was made;

A. Not applicable. See (a) above.

(c) Prior to the adjustment, what opportunity was afforded Mrs. Buffington to contest the finding that the "adjustment" did not defeat the purposes of the Act; and

A. On October 10, 1973, Mrs. Buffington asked the Seattle, Washington, Social Security Office for an explanation of the overpayment. Evidence and testimony on the issue of "defeat the purpose of title II" has not been presented.

(d) The source(s) of defendant's definition of "defeat the purposes of this subchapter." [Please attach copies of any applicable regulations, claims manual provisions, memoranda, or other documents.]

A. Not applicable. See (a) and (c) above.

Interrogatory #23

Again referring to 42 U.S.C. § 404(b), please state:

(a) Who determined that the "adjustment" of Mrs. Buffington's benefits was not "against equity and good conscience;"

A. A determination was not made as to whether or not adjustment of Mrs. Buffington's overpayment would be against equity and good conscience. Consideration of waiver of recovery of the overpayment was not requested.

(b) The date that determination was made;

A. Not applicable. See (a) above.

(c) Prior to the adjustment, what opportunity was afforded Mrs. Buffington to contest the finding that the "adjustment" was not against equity and good conscience; and

A. On October 10, 1973, Mrs. Buffington asked the Seattle, Washington, Social Security Office for an explanation

of the overpayment. Evidence and testimony on the issue of "against equity and good conscience" has not been presented.

(d) The source(s) of defendant's definition of "against equity and good conscience." [Please attach copies of any applicable regulations, claims manual provisions, memoranda, or other documents.]

A. Not applicable. See (a) and (c) above.

/s/ Russell F. Davis
RUSSELL F. DAVIS
Executive Officer
Bureau of Retirement and
Survivors Insurance

Subscribed and sworn to before me
this 17th day of April, 1974.

/s/ Dorothy H. Lamont
Notary Public
My Commission expires July 1, 1974

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Social Security Administration

[illegible] UNIT 33

Form Approved.
Budget Bureau No. 72-R0123.

APPLICATION FOR RETIREMENT INSURANCE BENEFITS*

*Provided by Section 202(a) of the Social Security Act, as amended

(Do not write in this space)

If you are awarded monthly benefits based on this application, you will be automatically entitled at age 65 to hospital insurance protection. In addition, this application form may be used for enrollment in the Supplementary Medical Insurance Benefits Plan.

OCT 15 1970

NOTICE—Whoever makes or causes to be made any false statement or representation of a material fact in an application or for use in determining a right to payment under the Social Security Act is subject to not more than a $1,000 fine or 1 year of imprisonment, or both.

I hereby apply for entitlement to all insurance benefits which may be payable to me under Title II and Part A of Title XVIII of the Social Security Act, as amended.

1 Enter Your Full Name: FRANCES S BINER

☐ Male ☒ Female

Enter your Social Security Number: 538 | 18 | 4795

2 Enter your date of birth (*Show month, day, and year*): 11 - 20 - 1905

Enter the name of the State or foreign country where you were born: CLEVELAND OHIO

3 (a) Check (✓) whether you are:

married less than 30 days

☐ MARRIED (*Whether living together or separated*) ☐ WIDOWED ☒ DIVORCED ☐ SINGLE

(*If you checked "MARRIED" or "WIDOWED," complete (b) and (c).*) (*If you checked "DIVORCED" or "SINGLE" go on to item 4.*)

(b) Enter your wife's maiden name or your husband's name	Date of birth (*If unknown, give age*)	Date of marriage	Your wife's or your husband's Social Security Number (*If none or unknown, so indicate*)

(c) If your husband or wife is deceased, enter the date of death here → Date of death

4 Your unmarried children (*including natural children, adopted children, and stepchildren*) may be eligible for benefits based on your earnings record, if they are, or have been in the past 12 months:

- under age 18, or
- age 18 to 22 and attending school, or
- age 18 or over and under a disability (*which must have begun before age 18*)

How many children do you have who may be eligible for benefits? → Number of children (*if none, write "None"*): none

5 (a) Have you ever before filed an application with the Social Security Administration for monthly benefits or for hospital or medical insurance?

☐ YES (*If "Yes," answer (b) and (c)*) ☒ NO (*If "No," go on to item 6*)

(b) Enter name of person on whose earnings record you filed other application(s)	(c) Enter Social Security Number of person named in (b) (*If unknown, so indicate*)

FORM SSA-1 (6-68) (OVER)

Exhibit A - Page 1

240-241

6 (a) Are you now or have you been for any period in the past 14 months unable to work because of a disabling condition?

☐ YES *(If "Yes," answer (b))* ☒ NO *(If "No," go on to item 7)*

(b) Enter date on which your disabling condition began → | Month, day, year

7 (a) Were you in the active military or naval service after September 7, 1939?

☐ YES *(If "Yes," answer (b) and (c))* ☒ NO *(If "No," omit (b), (c), and (d) and go on to item 8)*

(b) Enter name of branch (Army, Navy, etc.), country served (if other than U.S.), and dates of service

(c) Have you received, or do you expect to receive, a benefit from any other Federal agency?

☐ YES *(If "Yes," answer (d))* ☐ NO *(If "No," omit (d) and go on to item 8)*

(d) List all such agencies:

8 Did you work in the railroad industry any time on or after January 1, 1937?

☐ YES ☒ NO

9
- Enter below the names and addresses of all the persons, companies, or Government agencies for whom you worked during the last 12 months.
- If you worked in agricultural employment, give this information for this year and last year.
- If you were not an employee this year or last year, write "None" below and go on to item 11.

Name and address of employer *(If you had more than one employer, please list them in order beginning with your last (most recent) employer)*	Work began		Work ended *(If still working show "Not Ended")*	
	Month	Year	Month	Year
AMERICAN BUILDING MAINTENANCE. 1711 SO. JACKSON ST SEATTLE WASH	5	67	NOT ENDED	
(Use "Remarks" space for information about any other employers.)				

10 May we ask your employers for wage information needed to process your claim?

☒ YES ☐ NO

11 (a) Were you self-employed this year, last year, or the year before?

☐ YES *(If "Yes," answer (b))* ☒ NO *(If "No," skip to item 12)*

(b) Check the year or years in which you were self-employed	In what kind of trade or business were you self-employed?	Were your net earnings from your trade or business $400 or more? *(Check "Yes" or "No")*
☐ This year		
☐ Last year		☐ YES ☐ NO
☐ Year before last		☐ YES ☐ NO

Exhibit A - Page 2

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Please read the following information before going on to items 12, 13, and 14.

Some or all of your benefits are not payable if, while under age 72, you work for more than the monthly limit in employment (as defined below) or perform substantial services in self-employment in any month, and have earnings in excess of the exempt amount (as defined below) for the taxable year.* This applies to all employment and self-employment, whether or not covered by the Social Security Act.

The *monthly limit* is $125 per month for months in a taxable year ending prior to 1968 and $140 per month for any taxable year ending after 1967. If the taxable year is a calendar year, the $140 amount is effective January 1968.

The *exempt amount* of total earnings which a beneficiary may have without deduction from benefits is $1,500 per year for a taxable year which ends before 1968. It is $1,680 per year for taxable years ending after 1967. If the taxable year is a calendar year, $1,680 is the exempt amount beginning 1968.

As an employee, you count the gross wages (not the take-home pay) you earn during the year, regardless of when the wages are paid to you. As a self-employed person, you count the net earnings from your business (after deducting allowable business expenses).

12 (a) How much were your total earnings last year? . . . . . $ About 6200.

If the total in (a) is over the exempt amount, answer (b). If less, omit (b) and (c) and go on to item 13.

(b) Did you earn more than the monthly limit in employment or perform substantial services in self-employment in each month of last year?

☒ YES (*If "Yes," omit (c)*) ☐ NO (*If "No," answer (c)*)

(c) Circle each month of *last year* in which you did not earn more than the monthly limit in employment *and* did not perform substantial services in self-employment.

Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec

13 (a) How much do you expect your total earnings to be this year? (Count all of your earnings beginning with the first of this year and all expected earnings through the end of this year.) . . . . . $ About 6500.

If the total in (a) is over the exempt amount, answer (b). If less, omit (b), (c), and item 14.

(b) Have you earned more than the monthly limit in employment or performed substantial services in self-employment in each of the months of this year including the present month?

☒ YES (*If "Yes," omit (c)*) ☐ NO (*If "No," answer (c)*)

(c) Circle each month of *this year* including the present month in which you did not earn more than the monthly limit in employment *and* did not perform substantial services in self-employment.

Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec

14 (a) Do you expect to earn more than the monthly limit in employment or perform substantial services in self-employment in each of the next 3 months?

☒ YES (*If "Yes," omit (b)*) ☐ NO (*If "No," answer (b)*)

(b) List each of the next 3 months in which you do not expect to earn more than the monthly limit in employment *and* do not expect to perform substantial services in self-employment. .....

Answer item 15 if you are now in the last 3 months of your taxable year (Oct., Nov., and Dec. if your taxable year is a calendar year).

15 How much do you expect your total earnings to be next year? . . . . . $ About 6500.

An annual report of earnings must be filed with the Social Security Administration within 3 months and 15 days after the end of any year in which you earned more than the exempt amount, if you were under age 72 at least 1 full month of that year and received some benefit payment for such a month. FAILURE TO REPORT MAY RESULT IN THE LOSS OF ONE OR MORE MONTHLY BENEFITS.

16 Do you agree to file the annual report of earnings when required? ☒ YES ☐ NO

17 This application for retirement benefits may be retroactive for as many as 12 months from the date it is filed but not for any month before you reached age 62. *If you are between age 62 and age 66,* your application may be for benefits payable at a reduced rate. They will continue at a reduced rate even after you reach age 65.

If there are any months before you reach age 65 for which you do not wish to claim benefits, enter the months and give your reason All Months — Work & Earnings

* The yearly period referred to in this and following items is the same 12-month period you use in figuring your income tax. If you use a fiscal year, that is, a taxable year that does not end December 31 (with income tax return due April 15), enter here the month your fiscal year ends. | Month

Exhibit A (OVER) Page 3

Answer item 18 only if you are a married woman.

18 Is your husband receiving at least one-half of his support from you? ☐ YES ☐ NO

Answer item 19 only if you are married and your husband or wife is applying for benefits.

19 (a) Check (√) whether your marriage was performed by:

Clergyman or authorized public official ☐, or Other ☐ ..... (Explain)

(b) Were you married before your present marriage? ☐ YES ☐ NO

(If "Yes," give the following information about each of your previous marriages.)

Previous marriage	To whom married	When (*Mo., day, and year*)	Where (*Enter name of city and State*)
	How marriage ended	When (*Mo., day, and year*)	Where (*Enter name of city and State*)
Previous marriage	To whom married	When (*Mo., day, and year*)	Where (*Enter name of city and State*)
	How marriage ended	When (*Mo., day, and year*)	Where (*Enter name of city and State*)

(Use "Remarks" space for information about any other marriage)

Remarks: IS THERE A PUBLIC OR CHURCH RECORD OF BIRTH OR BAPTISM ESTABLISHED BEFORE AGE 5? YES ✓ NO ____ my BIRTH CERTIFICATE LISTS MY NAME AS FRANCIS

Knowing that anyone making a false statement or representation of a material fact in an application or for use in determining a right to payment under the Social Security Act commits a crime punishable under Federal law, I certify that the above statements are true.

If this application (and, if relevant, the enrollment question below) has been signed by mark (X), two witnesses who know the applicant must sign below, giving their full addresses.

Signature (*Write in ink*)

1. Name

Sign Here ▷ (X) Frances S. Burns

Address (*Number and street, city, State, and ZIP Code*)

Mailing address (*Number and street, P.O. box, or rural route*)

3015 E. CHERRY ST

2. Name

City and State: SEATTLE WASH

ZIP Code: 98122

Address (*Number and street, city, State, and ZIP Code*)

Date (*Mo., day, and year*)

Telephone number: EA 5-6015

Enter name of county (*if any*) in which you now live: KING.

Answer the question below only if you are now AGE 65 or older, or you will reach AGE 65 in this month or one of the next 3 months.

ENROLLMENT IN THE SUPPLEMENTARY MEDICAL INSURANCE BENEFITS PLAN

Your social security district office will be glad to explain this plan and to give you a leaflet containing information on the physicians' and surgeons' services and other medical services covered, premium amounts, enrollment periods, etc. A request for enrollment cannot be effective unless it is made within one of the enrollment periods specified in the law. If you do not enroll within your initial enrollment period, you may have to pay a higher premium and your coverage will be delayed.

Do you wish to enroll in the supplementary medical insurance benefits plan? (Premium payments will be due. Where possible, these payments will be deducted from your monthly benefit check.)

☒ YES ☐ NO ☐ Undecided ☐ Currently enrolled

Sign below regarding medical insurance benefits plan.

Sign Here ▷ (X) Frances S. Burns

U.S. GOVERNMENT PRINTING OFFICE : 1958 O - 399-435

Exhibit A - Page 4

SOCIAL SECURITY ADMINISTRATION

Form Approved OMB No. 72-R0524

ANNUAL REPORT OF EARNINGS—1972

Please read enclosed INSTRUCTION leaflet carefully.

1972

NOTICE: Whoever makes a false statement in connection with this report is liable to a fine or imprisonment or both.

PRINT NAME AND ADDRESS BELOW IF NOT ALREADY SHOWN, THEN ANSWER QUESTIONS ON OTHER SIDE.

Frances S. Diner
3015 E Cherry
Seattle, WA 98122

4 Answer only if you answered item 2b on other side.
Show what work you did in connection with your business during each month for which you made an entry in item 2b. (Also explain if ownership of your business changed)

MONTHS	Hours of work	KIND OF BUSINESS

Please do not bend, pin or tear this card

Exhibit B Pingel.

PLEASE READ INSTRUCTIONAL LEAFLET WHEN COMPLETING THIS FORM

1 WERE YOU AN EMPLOYEE IN 1972?

[X] YES (If "yes" complete a & b)

[ ] NO

a. Show amount of wages earned from January 1, 1972 through December 31, 1972 (gross wages before payroll deductions) ..... $ 7257.34

b. Place "X" in box for each month in which you did NOT earn more than $ 140

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1	2	3	4	5	6	7	8	9	10	11	12

2 WERE YOU SELF-EMPLOYED IN 1972?

[ ] YES (If "yes" complete a and b)

[X] NO

a. Show 1972 net earnings (or loss) from self-employment (if a loss, write "L" after the amount) ..... $ [illegible]

(See guides on page 4 of instructional leaflet for completing this item)

b. Place "X" in box for each month in which you believe you did NOT perform substantial services in your business and complete item 4 on the other side.

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
1	2	3	4	5	6	7	8	9	10	11	12

3 EARNINGS ESTIMATE FOR 1973

a. Do you expect to earn more than $ 2,100 in 1973? (If yes, complete both (b) and (c).) — CHECK ONE: [ ] Yes [X] No

b. Show amount you expect to earn in 1973 ..... $ [illegible]

c. Show the first month of 1973 in which you earned over $ 175 in wages OR performed substantial services in self employment (If no month show "None") ..... Month

DATE AND SIGN ▷ DATE 12/28/73 SIGNATURE

SOCIAL SECURITY CLAIM NUMBER 513 | 15 | 4795 LETTER A TELEPHONE NO. 355-6015

Form SSA-L07H (1-72)

Department of Health, Education and Welfare
Social Security Administration

DETERMINATION OF BENEFIT ADJUSTMENT FOR WORK NOTICES AND ANNUAL REPORTS

The following determination is based on supporting evidence on file and certification of payment is recommended as follows:

CAN	DATE	PC	RUN	NEW ABN	OLD ABN
538-18-4795A	11/15/72	SF	X15	3153	4268

NAME AND ADDRESS

FRANCES S BINER
3015 E CHERRY ST
SEATTLE WA 98122

GROUP	DR. EFF. MO.	CR. EFF. MO.	UPDATE MO
		11/72	12/72

O.O. CODE	TRANSMISSION CYTE	SPECIAL ACTION CODE	EDP LTR
916	K14		

REASON FOR ACTION: WORK NOTICE A

TYPE OF ACTION: REINSTATEMENT

PAYMENT RECORD DATA

PIC	PAYMENT STATUS	PREMIUM STATUS		PREM. COLL. BY		MO. PAYMENT	PIA	MAXIMUM	OUTSTANDING PAYMENT DATA
A	COND.					203.60	209.40	361.20	

CURRENT NOTICE DATA

Event 1				Event 2			
CURR. WK. CODE	EFF. DATE	EARNINGS	NON-WORK MONTHS	CURR. WK. CODE	EFF. DATE	EARNINGS	DIARY DATE
WK	01/72	7201680		NW	01/73	7301680	

PRIOR YEAR OVERPAID MOS.	CURRENT YEAR OVERPAID MOS	AR REFUND DATA	DATE OF RET ISSUE	CHECK NUMBER	CHECK AMOUNT

ADDITIONAL PROCESSING DATA

72 EA NONE 72 A/W 1814.80

ADDITIONAL PAYMENT INFORMATION	EFF. MONTH	NET AMOUNT DUE	PAID THRU	MONTHLY RATE
BASED ON YOUR REPORT, YOU WILL RECEIVE BENEFITS AS INDICATED, SEE REVERSE SIDE	09/72	1809.00	10/72	203.60

ADJUSTED HISTORY RECORD

PIC	PAYMENT STATUS	PREMIUM STATUS		PMA	CMA	MO. PAYMENT	PIA	MAXIMUM	OUTSTANDING PAYMENT DATA
A	CURRENT	5.80		X	X	203.60	209.40	361.20	DUE 1809.00 10/72

BIC	PERIOD	RATE	POSTING	PERIOD	RATE	POSTING	PERIOD	RATE	POSTING
A	01/72	174.50	PD	09/72	209.40	PD			

REMARKS

A 203.60

SECOND EVENT DIARY DELETED

Exhibit E

REVIEWER'S ACTION | APPROVED BY BENEFIT AUTHORIZER | DATE

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

Form Approved
OMB No. 72-R0054

REQUEST FOR RECONSIDERATION

Received

NOV 29 1973

91576

SSA DISTRICT OFFICE

NAME OF WAGE EARNER OR SELF-EMPLOYED PERSON	SOCIAL SECURITY CLAIM NUMBER
Frances S. Biner	538-18-4795-A

NAME OF CLAIMANT (If different from person named above.)

CLAIM FOR (Specify type, e.g., retirement, disability, hospital insurance, etc.)

Retirement

I do not agree with the determination made on the above claim and request reconsideration.

My reasons are:

I do not believe there was any overpayment.

NOTE: If the date of the notice of the determination on this claim was more than six months ago include your reason for not making this request earlier.

I am submitting the following additional evidence (If none, write "None."):

None

Signature (First name, middle initial, last name) (Write in ink)

SIGN HERE ▷ Frances S. Biner

Date (Month, day, year) 11-27-73

Telephone Number 325-6015

Mailing Address (Number and street, Apt. No., P.O. Box, or Rural Route)

3015 E. Cherry St

City and State: Seattle, Wash

ZIP Code: 98122

Enter Name of County (if any) in which you now live: King

Witnesses are required ONLY if this request has been signed by mark (X) above. If signed by mark (X), two witnesses to the signing who know the person requesting reconsideration must sign below, giving their full addresses.

1. Signature of Witness	2. Signature of Witness
Address (Number and street, City, State, ZIP Code)	Address (Number and street, City, State, ZIP Code)

FOR SOCIAL SECURITY OFFICE USE ONLY

PROVIDER NAME AND NUMBER (City and State)	INTERMEDIARY NAME AND NUMBER (City and State)	SOCIAL SECURITY OFFICE ADDRESS
		619 5015 3/11 12/3/74

ROUTING INSTRUCTIONS (Check one)

- ☐ State Agency (Route with disability folder)
- ☐ Payment Center _____ BDI, Balto. ☐
- ☐ _____ Intermediary ☐ DRB, Balto.
- ☐ Division of Foreign Claims, Balto.
- ☐ BDPA, Attn: CWAB, Balto.
- ☐ _____ RO (Emergency)

FORM SSA-561 (4-71) NOTE: Take or mail completed copies to your Social Security Office.

Exhibit H

EXHIBIT D

[SEAL]

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
Baltimore, Maryland 21235

April 8, 1974

REFER TO:

IRI-421
538-18-4795

Mrs. Frances S. Biner
3015 East Cherry Street
Seattle, Washington 98122

Dear Mrs. Biner:

This refers to your request for reconsideration of the determination to adjust the overpayment of $2,233.60 against benefits due you.

Payment based on the claim for retirement benefits you filed in October 1970 was not made because you continued to work and earn over the allowable amount. In November 1972 you contacted the social security office to request payment of your retirement benefits based on a change in your work situation. Although you reported that you would retire in December 1972, your report was processed showing an estimate of $1,680 for 1972. Consequently, payment was made for all months of 1972 rather than beginning with the January 1973 monthly benefit.

At the Administration's request you filed in August 1973 an annual report of earnings for 1972. Based on your reported work and earnings of $7,257 benefits were not payable for 1972, and you were advised that you had been overpaid $2,233.60.

Section 204 of the Social Security Act provides that there shall be no adjustment or recovery of an overpayment

when the person liable for repayment is without fault *and* adjustment or recovery would deprive the person of income for ordinary and necessary living expenses or would be unfair for some other reason. Both conditions must be met. Although the individual against whom adjustment is considered may need substantially all current monthly benefits to meet current and necessary living expenses, adjustment of the overpayment against current monthly benefits is required unless the individual is also without fault in causing the overpayment.

From our review of your record we are unable to find you without fault in causing the overpayment. Although the Administration may have erred in the processing of the report you made in November 1972, you should have been aware that benefits were not payable for months in which you were regularly employed. It was because of your work that you had not previously received benefits. When you reported that you were retiring in December 1972, you should have known that benefits were not due for months prior to January 1973. Yet, while you were still working, you received three checks representing payment of benefits for months before 1973.

The first check represented payment for January 1972 through October 1972, and the second and third checks represented payment for November 1972 and December 1972 respectively. The large retroactive payment of $1,809 representing benefits through October 1972 should certainly have put you on notice to inquire whether such payment was actually due. Since you accepted all payments without question, you failed to exercise a high degree of care to avoid an overpayment.

That the overpayment may have originated with administrative error, therefore, does not relieve you from establishing that you were without fault in accepting the incorrect payments. Accordingly, we find, based on the evidence on record, that you do not meet the requirements for waiver of adjustment of the overpayment and affirm the overpayment determination and denial of waiver.

If you believe either determination is not correct, you may request a hearing before an administrative law judge of the Bureau of Hearings and Appeals. If you want a hearing, you must request it through any social security office not later than 6 months from the date of this notice.

Sincerely,

/s/ Hugh F. McKenna
HUGH F. MCKENNA
Director
Bureau of Retirement and
Survivors Insurance

cc: Mr. Jeff Spence, Attorney for Plaintiff

EXHIBIT I

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Civil Action No. 734-73C2

FANNIE BUFFINGTON and FRANCES BINER, individually and on behalf of ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

v.

CASPAR WEINBERGER, individually and in his capacity as Secretary of the Department of Health, Education, and Welfare, DEFENDANT

AFFIDAVIT OF JAMES E. FORBUS

BALTIMORE COUNTY)
) ss
STATE OF MARYLAND)

I, James E. Forbus, being duly sworn, depose and say that I am the Deputy Director of the Bureau of Retirement and Survivors Insurance of the Social Security Administration, and as such, am responsible for the formulation of policies and procedures whereby retirement, dependent and survivors' claims under Title II of the Social Security Act are adjudicated. Such responsibilities also include the supervision of the Program Centers of the Social Security Administration in their adjudication of Title II claims. In connection with my official duties, I have legal custody of certain records, documents, and other information established and maintained by the Department of Health, Education, and Welfare, pursuant to Title 42, United States Code, section 405.

The files maintained by the Social Security Administration with respect to Fannie Buffington and Frances

Biner, which have been examined under my direction and supervision, reveal the following:

1. Mrs. Frances Biner filed her application in Seattle, Washington, on October 5, 1970, for retirement insurance benefits. She gave her birthdate as November 20, 1905. Mrs. Biner stated on her application that she did not wish to claim benefits for any months before age 65 because of her earnings.

2. Some or all of retirement insurance benefits were not payable if while under age 72 the claimant worked for more than the monthly limit in employment ($140.00) or performed substantial services in self-employmnet in any month, and had earnings in excess of the exempt amount for the taxable year ($1,680.00). Effective January 1, 1974, this was changed to $200.00 a month and $2400.00 a year.

3. Mrs. Biner listed her income for 1969 as about $6,200.00, for 1970 as about $6,500.00, and for 1971 as about $6,500.00.

4. The application which Mrs. Biner signed October 5, 1970, states: "Annual report of earnings must be filed with the Social Security Administration within three months and fifteen days after the end of any year in which you earned more than the exempt amount, if you were under age 72 at least one month of that year and received some benefit payment for such a month. FAILURE TO REPORT MAY RESULT IN THE LOSS OF ONE OR MORE MONTHLY BENEFITS." Following this is the question: "Do you agree to file the annual report of earnings when required? Mrs. Biner checked the box marked "YES".

5. Mrs. Biner was found entitled to benefits effective November 1970 based on her birthdate. On October 26, 1970, Mrs. Biner was notified that she was entitled to $132.30 per month beginning November 1970, but that she would not receive benefits at that time because of her earnings from work. Mrs. Biner was also sent the booklet, "Rights and Responsibilities of Those Who Receive Social Security Retirement or Survivor Benefits".

6. The rights and responsibilities booklet explains how

earnings from work affect benefits and reiterates the requirement to report earnings. The booklet also states if a benefit check is sent which the recipient knows is not due she must return it. The booklet provides: "To fail to report any occurrence that affects the right to payments, or to make a false statement about it, can lead to a fine or imprisonment, or both. The law also provides for forfeiture of one or more monthly benefits for failure, without good cause, to notify the Social Security Administration of certain occurrences which affect eligibility to payments."

7. Mrs. Biner was paid no benefits until she notified the Seattle office in November 1972 that she was going to stop working and would not earn over $1,680.00 in 1972.

8. Mrs. Biner was paid benefits for months beginning January 1972. In the interim, her monthly benefit was increased. Her first check was for $1,809.00. This figure represents her monthly benefit rate of $174.50 effective January through August, and her monthly benefit rate of $209.40 effective September and October, less $5.80 for supplementary medical insurance.

9. November 22, 1972, a notice was sent to Mrs. Biner explaining her first check. This notice stated that she "should report promptly to any Social Security office any change which will affect payments, such as: a. If you go to work while under age 72 and expect to earn over $1,680.00 in a year." The notice also states: "under social security law, any overpayment must be withheld from benefits or paid back unless *both* of the following are true:

a. The overpayment wasn't your fault in any way and you cashed the check(s) because you thought they were correct, *and*

b. You couldn't meet your necessary living expenses if you had to pay back the overpayment or have it withheld from your social security benefits; or it would be unfair for some other reason."

10. Mrs. Biner received checks of $203.60 for November and December 1972. This made a total cash

payment of $2,216.20 for the year 1972, and she had been given credit for 3 months Medicare payments, making a total overpayment of $2,233.60.

11. Overpayment to Mrs. Biner was discovered when it was learned through a report by her employer to the Bureau of Data Processing of the Social Security Administration that she had earned $7,257.34 in 1972.

12. Mrs. Biner had not filed an annual report of earnings for 1972 as required so it was solicited from her. She completed the report August 28, 1973, verifying that she had earned $7,257.34 in 1972 and more than $140.00 each month.

13. Mrs. Biner was notified September 21, 1973, of overpayment totaling $2,233.60 ($2,216.20 cash payments plus $17.40 credit for three months' Medicare premium). The notice stated that in order to recover the amount regular monthly benefits would be withheld from September 1973 until July 1974, except that she would receive a partial benefit of $92.90 for July.

14. Mrs. Biner was not provided advance notice relating to overpayment because prior to January 1974 an annual report submitted by the beneficiary was an exception to the Claims Manual provision that adjustment of an overpayment would be deferred at least 30 days to give the overpaid beneficiary reasonable opportunity to contest the accuracy of the determination of overpayment or to establish that a basis exists for waiver of adjustment or partial adjustment.

15. Two letters were written by Mrs. Biner after she was notified of overpayment. She claimed innocence in causing overpayment and inquired about making monthly payments instead of having her benefits withheld from September 1973 through July 1974.

16. What constitutes "fault" on the part of the overpaid individual from whom the Administration seeks to recover depends on whether the facts show that the incorrect payment to the individual resulted from:

"a. An incorrect statement made by the individual which he knew or should have known to be incorrect; or

b. Failure to furnish information which he knew or should have known to be material; or

c. With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect." 20 C.F.R. 404.507.

17. November 19, 1973, Mrs. Biner was notified that a determination had been made that she was at fault but to avoid hardship overpayment would be recovered by withholding $50.00 per month. The letter explained the reasons for this determination and gave the procedure for reconsideration if she felt the decision was incorrect.

18. Mrs. Biner requested reconsideration November 27, 1973.

19. A letter was sent to Mrs. Biner December 14, 1973 explaining how the overpayment would affect her payments. The withholding of $50.00 per month began November 1973.

20. Ordinarily when action is taken to recoup overpayment if the beneficiary requests reconsideration of the overpayment determination the District Office immediately notifies the reviewing office to initiate payment of benefits effective with the current operating month until such time as the issue has been resolved. This was not done. However, the determination to adjust was affirmed on reconsideration so a restoration of benefits pending reconsideration actually would have resulted in increased overpayments.

21. Mrs. Biner was notified April 8, 1974, that upon redetermination the denial of waiver of adjustment of the overpayment was affirmed.

22. Because of additional earnings beyond age 65 Mrs. Biner was given recomputations and delayed retirement credits. The increase due Mrs. Biner from January 1973 to October 1973 was used to reduce the 1972 overpayment to $1,583.70. The remaining overpayment is being recovered by withholding $50.00 per month November 1973 through May 1976 and $33.70 June 1976.

23. Beginning January 1973 Mrs. Biner's monthly benefit rate was $234.20 less $6.30 for medical insurance

premium, or $227.90. Effective March 1974 there was a general seven percent increase in benefits and Mrs. Biner's benefits were raised to $250.30.

24. Mrs. Biner was paid $177.90 per month January and February 1974, $194.40 March, April, and May 1974, and $203.30 for June 1974.

25. Mrs. Biner filed for a request for a hearing before an administrative law judge on June 3, 1974.

26. Effective September 1969 Mrs. Fannie Buffington began receiving retirement benefits in the amount of $51.40. She became entitled to wife's benefits on her husband's record effective December 1970. At that time her retirement benefit was $60.00 per month and her wife's benefit was $7.00, totaling $67.00 per month. Both in September 1969 and December 1970 when Mrs. Buffington was sent a Certificate of Social Insurance Award she was also sent a copy of the booklet "Rights and Responsibilities". See #6, *supra*.

27. Mr. Ossie T. Buffington, husband of Fannie, had quit working when he filed his application for benefits November 19, 1970. At this time he agreed on his application to report to the Social Security Administration if he returned to work.

28. March 23, 1972, Mrs. Buffington was notified that her wife's benefit was increased due to an increase in her husband's benefit because of his additional earnings in 1970. On the back of the letter was a reminder to notify the Administration of any event which might affect payment of benefits.

29. Mr. Buffington filed an annual earning report for 1972 on September 4, 1973, showing earnings of $3,240.27 and wages over $140.00 per month for January through September. Based on this information Mrs. Buffington's wife's benefit was subject to a deduction of $13.10 per month for January through September, a total of $78.60.

30. Determination of overpayment of $78.60 to Mrs. Buffington was made September 23, 1973.

31. Notice of the overpayment was sent to Mrs. Buffington October 3, 1973, indicating that the overpayment would be withheld from her next benefit. See #14, *supra*,

regarding lack of more previous notice, although this constituted nearly 30 days notice.

32. Mrs. Buffington filed for reconsideration on November 27, 1973. The determination on her request should be made by the middle of July 1974.

33. Mrs. Buffington was entitled to retirement insurance benefit of $80.50 plus a wife's benefit of $15.70 minus a medical insurance premium of $6.30, totaling $89.90 per month September 1973 through January 1974. The overpayment was withheld from her October 1973 check.

34. Mrs. Buffington received $89.90 September 1973, $11.30 October 1973, and $89.90 each month November 1973 through January 1974.

/s/ James E. Forbus
JAMES E. FORBUS
Deputy Director
Bureau of Retirement and
Survivors Insurance

Subscribed and sworn to before
me this 10th day of July 1974.

/s/ Mary A. Brenner
Notary Public

My Commission expires July 1, 1978

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. 734-73C2

FANNIE BUFFINGTON and FRANCES BINER, individually and on behalf of all others similarly situated, PLAINTIFFS

vs.

CASPER WEINBERGER, individually and in his capacity as Secretary of the Department of Health, Education and Welfare, DEFENDANT

ORDER MODIFYING DEFINITION OF CLASS

This matter having been heard on cross motions for modification of the class action order entered on April 8, 1974, plaintiffs being represented by their attorney Jeff Spence of the Seattle Legal Services Center, defendant being represented by Charles Mansfield, Assistant United States Attorney, and Richard Wetmore, Assistant Regional Attorney, Department of Health, Education and Welfare, the court, having considered the documents on file in this action and the argument of counsel and being fully advised, now finds that:

1. With the exceptions set forth in paragraph 2 below, plaintiffs are appropriate representatives of a class composed of all individuals eligible for Social Security benefits pursuant to 42 U.S.C. § 402 whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing.

2. The class of which plaintiffs are appropriate representatives does not include:

a. Residents of Hawaii; and

b. Residents of the Eastern District of Pennsylvania; and

c. All other individuals who are plaintiffs or members of a plaintiff class in an action against the instant de-

fendant challenging his practice of reducing or otherwise adjusting Social Security benefits without prior notice and opportunity for a hearing, if a decision on the merits in any such action was entered on or before October 18, 1974.

3. The class is so numerous that joinder of all members is not practicable.

4. There are questions of law and fact common to the class.

5. The claims of the representative parties are typical of the claims of the members of the class.

6. The representatives of the class will fairly and adequately protect the interests of the class.

7. Defendant has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

IT IS THEREFORE ORDERED that this action shall be maintained as a class action pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure with a class as described in paragraphs 1 and 2 above.

Dated: October 28, 1974.

/s/ Morell E. Sharp
MORELL E. SHARP
United States District Judge

Presented by:

/s/ Jeff Spence
JEFF SPENCE
Attorney for Plaintiffs

Approved as to form by:

/s/ _____
CHARLES MANSFIELD
Assistant United States Attorney
Attorney for Defendant

/s/ _____
RICHARD WETMORE
Assistant Attorney General, HEW
Attorney for Defendant

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Civil Action No. 734-73C2

[Filed Oct. 22, 1974]

FANNIE BUFFINGTON and FRANCES BINER, individually and on behalf of ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS

—*vs*—

CASPAR WEINBERGER, Secretary of Health, Education, and Welfare, DEFENDANT

SUMMARY JUDGMENT

This action having come on regularly for hearing before this Court on cross-motions for summary judgment, plaintiffs being represented by Jeff Spence, of Seattle Legal Services, and defendant being represented by Charles Mansfield, Assistant United States Attorney, and Richard Wetmore, Assistant Regional Attorney, Department of Health, Education and Welfare, the Court having considered the documents in the file and the arguments of counsel, and being fully advised, now hereby ORDERS that:

1. This Court has jurisdiction over the subject matter of this lawsuit, pursuant to 28 USC § 1361, and 5 USC § 701 *et seq.*

2. Defendant, his successors, his agents, employees and all persons in active concert or participation with them shall be restrained and enjoined from reducing or adjusting social security benefits accruing to plaintiffs and their class pursuant to 42 USC § 402 without affording them an opportunity for a hearing before any recoupment or adjustment is effected.

3. The hearing shall be conducted by an employee of the Social Security Administration who has had no prior

knowledge of the events leading to the determination of overpayment and decision to recover such overpayment or adjust the beneficiary's payments. The decision maker shall issue a written decision, a copy of which will be sent to the beneficiary, and representative if any. The decision maker shall specify findings of fact and conclusions in support of the decision, and in particular shall state the basis for a finding of overpayment and whether there was fault on the part of the beneficiary. If there is no fault, the decision shall indicate whether recovery of the overpayment will defeat the purpose of Title II of the Social Security Act or be against equity and good conscience, as those terms are defined by the applicable regulations promulgated by the Social Security Administration. A notice advising a beneficiary of his or her right to appeal the decision will be mailed with a copy of the decision.

4. The requirements of such hearing shall include at least the following:

a. The recipient shall have the opportunity to personally appear, be heard, and cross-examine any witnesses;

b. The recipient shall have the opportunity to be represented by an attorney or other representative;

c. The recipient shall have the opportunity to submit documentation for consideration at the hearing;

d. The recipient shall have the opportunity to examine his or her claim file at least five days prior to the date of hearing;

e. No transcript is required to be made of the hearing.

5. Any party aggrieved, in whole or in part, with the decision of the decision maker shall have the right to further administrative appeal.

6. Defendant, his agents and employees and all persons in active concert or participation with them shall be restrained and enjoined from recouping or adjusting social security benefits accruing to plaintiffs and their class pursuant to 42 U.S.C. § 402 without affording them adequate notice of their opportunity for a pre-adjustment

hearing described above and of any other administrative relief to which they may be entitled. If a request for a pre-adjustment hearing is not made within thirty (30) days of the date of mailing of the notice the beneficiary shall be presumed to have waived his or her right to the hearing.

7. Such notice shall include at least the following:

a. A statement of alleged overpayment, an explanation of basis for overpayment, and proposed action for recoupment of the overpayment;

b. A statement of beneficiary's right to hearing;

c. Instructions and forms for requesting a hearing including an explanation that if a hearing is not requested recoupment of the alleged overpayment will begin;

d. A statement of any other administrative relief, such as waiver or partial adjustment;

e. A statement that local office will assist recipient in completing and submitting the forms.

8. All benefits which have been withheld from the named plaintiffs shall be restored pending the opportunity for a hearing as described above.

9. Defendant's motion to stay this order, made in open court on September 13, 1974, is denied.

Dated this 22nd day of October, 1974.

/s/ Morell E. Sharp
MORRELL E. SHARP
United States District
Court Judge

Presented by:

by Charles F. Mansfield
RICHARD H. WETMORE
Attorney for Defendant

/s/ Charles F. Mansfield
CHARLES F. MANSFIELD
Attorney for Defendant

Approved as to form by:

/s/ Jeff Spence
JESS SPENCE
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

No. 734-73C2

[Filed Nov. 6, 1974]

FANNIE BUFFINGTON AND FRANCES BINER, individually and on behalf of all others similarly situated, PLAINTIFFS

v.

CASPAR WEINBERGER, Secretary of Health, Education, and Welfare, DEFENDANT

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that the defendant, Caspar W. Weinberger, Secretary of Health, Education, and Welfare, does hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment in favor of the plaintiffs and the class they represent entered in this action on the 30th day of October, 1974.

DATED this 6th day of November, 1974.

STAN PITKIN
United States Attorney

/s/ Charles F. Mansfield
CHARLES F. MANSFIELD
Assistant United States Attorney

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

OMB No. 72-R[illegible]

REQUEST FOR RECONSIDERATION

SEATTLE, WASHINGTON
DEC 17 1973
91916
SSA DISTRICT OFFICE

NAME OF WAGE EARNER OR SELF-EMPLOYED PERSON: Frances S Biner
SOCIAL SECURITY CLAIM NUMBER: 538-18-4795-A

NAME OF CLAIMANT (If different from person named above.)

CLAIM FOR (Specify type, e.g., retirement, disability, hospital insurance, etc.): Retirement

I do not agree with the determination made on the above claim and request reconsideration.

My reasons are: I do not believe there was any overpayment.

NOTE: If the date of the notice of the determination on this claim was more than six months ago include your reason for not making this request earlier.

I am submitting the following additional evidence (*If none, write "None."*): None

Signature (First name, middle initial, last name) (Write in ink)

SIGN HERE: Frances S. Biner

Date (Month, day, year): 12-14-73

Telephone Number: EAS-6015

Mailing Address (Number and street, Apt. No., P.O. Box, or Rural Route): 3015. E. Cheary St.

City and State: Seattle, Wash

ZIP Code: 98122

Enter Name of County (if any) in which you now live: King

Witnesses are required ONLY if this request has been signed by mark (X) above. If signed by mark (X), two witnesses to the signing who know the person requesting reconsideration must sign below, giving their full addresses

1. Signature of Witness	2. Signature of Witness
Address (Number and street, City, State, ZIP Code)	Address (Number and street, City, State, ZIP Code)

FOR SOCIAL SECURITY OFFICE USE ONLY

PROVIDER NAME AND NUMBER (City and State)	INTERMEDIARY NAME AND NUMBER (City and State)	SOCIAL SECURITY OFFICE ADDRESS

ROUTING INSTRUCTIONS (Check one)

- ☐ State Agency (Route with disability folder)
- ☐ Payment Center _____ BDI, Balto. ☐
- ☐ _____ Intermediary ☐ DRB, Balto.
- ☐ Division of Foreign Claims, Balto.
- ☐ BDPA, Attn: CWAB, Balto.
- ☐ _____ RO (Emergency)

FORM SSA-561 (4-71) NOTE: Take or mail completed copies to your Social Security Office.

Exhibit I

267

JEFF SPENCE
SEATTLE LEGAL SERVICES CENTER
5308 Ballard Avenue N.W.
Seattle, Washington 98107
Phone: (206) 789-2450

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

[Filed Jun. 20, 1974]

No. 734-73C2

FANNIE BUFFINGTON and FRANCES BINER, individually and on behalf of all others similarly situated, PLAINTIFFS

vs.

CASPER WEINBERGER, individually and in his capacity as Secretary of the Department of Health, Education and Welfare, DEFENDANT

AFFIDAVIT IN SUPPORT OF PLAINTIFFS MOTION FOR SUMMARY JUDGMENT

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, Fannie Buffington, being duly sworn, on oath, depose and say that:

I am a plaintiff in the above-entitled action.

I live with my husband, Ossie Buffington, 65, at 1525 26th Avenue East, Seattle, Washington. I am 68 years old.

Our primary sources of income for the current year have been our monthly Social Security benefits. My husband receives $159.30 per month, and except for November, 1973, I receive $89.90. This makes a total of $249.20. Weather permitting, my husband occasionally

does odd jobs such as yard work. The average monthly income from such jobs, when they are available, is approximately $20.00.

During the first or second week of October, 1973, I received a letter from the Social Security office informing me that I had previously received an overpayment in the amount of $78.60, and, consequently, my November check would be reduced accordingly, leaving me a November check of $11.30.

I was not informed of the cause of the alleged overpayment, and to this day I have been unable to find out anything about the overpayment.

Two or three days after I received the letter I went to the local Social Security office and asked for an explanation. I told the woman I spoke with that I did not know why I was being charged with an overpayment, and also that I could not afford to have my November check reduced. She told me that she would "write a letter about it for me."

However, my November check arrived on November 3, 1973, in the amount of $11.30. That was on Friday.

The following Monday I returned to the Social Security office and talked with another woman employee. I told her about my first visit. She went to check for me and returned to tell me that there had been "no response yet" and that she "would let me know" when they heard from the regional office.

I waited ten more days, but there was no response. I then decided that I couldn't afford to wait any longer and I went to a Legal Services office.

On November 19, 1973, my attorney phoned the local Social Security office, but was told by a Mr. Pemberton that the local office had no records or a file for me and thus it would be impossible to check on my case.

My attempts to seek relief through administrative channels have met with delay and frustration, with no end in sight. Therefore, I am appealing to this court for immediate relief.

The reduction in my November check has been a severe blow to us. Our monthly living expenses include mortgage payment, $109.00; car payment, $118.53; car insurance, $37.38; life insurance, $9.50; and credit union repayment, $40.00. We receive food stamps and pay $33.00 for $95.00 worth of food. We have monthly utility bills of approximately $35.00. We owe a doctor $130.00, and the doctor expects $30.00 per month. We owe more than $180.00 for our son's funeral expenses. In addition, we are making small monthly payments to a collection agency, but were forced to miss the November payment.

We could only pay $58.00 on the $118.53 car payments. Consequently, the loan had to be refinanced. Previously the balance was $2,075.54, now it is $2,163.60. We depend upon my Social Security check to make the car payments.

Unless the $78.60 which was withheld from my November check is returned immediately my husband and I will suffer serious and irreparable injury. We desperately need that money to pay the November bills which are now due and owing.

Therefore, we are asking this court for immediate relief.

/s/ Fannie M. Buffington
FANNIE M. BUFFINGTON

Subscribed and sworn to before me
this 26th day of November, 1973.

/s/ Vera N. Jones
VERA N. JONES
Notary Public in and for
the State of Washington,
residing at Seattle.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION

[SEAL]

PAYMENT CENTER
Kansas City, Missouri 64106

BUREAU OF RETIREMENT
AND SURVIVORS INSURANCE

Refer to Claim Number
460-14-2600-A

October 3, 1973

Fannie M. Buffington
1525 26 Ave E
Seattle WA 98102

Information about your social security benefits is shown below:

1. Amount of your next check—$11.30.
2. Covers benefits due through—October 1973.
3. Will be sent about—November 3, 1973.
4. Amount of regular check thereafter—$89.90.

Based upon the insured individual's earnings, it has been determined that you have been overpaid in the amount of $78.60. Therefore, an adjustment is being made in your benefits to withhold the additional amount necessary.

If you are enrolled in the medical insurance program, please see item 3 on the back of this notice.

Please notify any social security office promptly of an event which might affect the payment of benefits. There is an explanation on the back of this notice of how work and earnings affect benefit payments.

If you have questions about your claim, you may get in touch with any social security office. Most questions can

be handled by telephone or mail. If you visit an office, however, please take this notice with you.

Sincerely yours,

/s/ R. W. Jacobson
R. W. JACOBSON
Director of Operations

SEE REVERSE SIDE OF THIS NOTICE

If you believe this determination is not correct, you may request that your claim by reexamined. If you want this reconsideration you must request it not later than 6 months from the date of this notice. You may make your request through any social security office. If additional evidence is available, you should submit it with your request.

1. How Your Work and Earnings Affect Your Benefits

If you earn $2,100 or less in a taxable year (usually January through December) ending after December 1972, nothing will be withheld from your benefits.

If you earn $2,100 in a year, $1 will be withheld from your benefits for each $2 of earnings above $2,100. You will never have more than $1 in benefits withheld for each $2 of earnings above $2,100.

However, regardless of total earnings in a year, benefits are payable for any month in which you neither earn wages of more than $175 nor perform substantial services in self-employment.

Benefits are also payable for all months in which you are 72 or older, regardless of the amount of your earnings in or after the month you reach 72.

2. Report Any Significant Change in Your Work and Earnings to Any Social Security Office

The amount of benefits payable to you for this taxable year has been determined on the basis of your work status at the time you made your annual report of earnings for last year and on the amount of earnings you expected for this year as shown on that report. You should report promptly to any social security office any change which will affect your payments, such as:

a. If you go to work while under age 72 and expect to earn over $2,100 in the year;

b. If you have previously reported that you expect to earn over $2,100 from work, but

(1) You stop work, or

(2) You do not earn over $175 for any month and you do not perform substantial services in self-employment, or

(3) You expect to earn substantially more or less in the year than you previously told us.

Prompt reports enable us to make adjustments to your benefits payments when you have income from work. Delayed reports make it necessary for us to withhold benefits during periods when you may not have income from work.

Any difference between the amount of benefits withheld based on your estimate of earnings and the amount that must be withheld on the basis of your actual earnings will be adjusted after the close of the year when you file your next annual report.

If you have any questions about reporting, you should get in touch with any social security office.

3. Information About Medical Insurance Premiums

a. *If monthly social security benefits are being paid to you now—*

If your premiums are paid up-to-date, 1 month's premium will be withheld from your benefit check each month.

If you owe premiums for last year, the full amount owed will be withheld from your next check.

If you owe premiums only for this year, only 1 month's premium will be withheld from your next check and at the end of the year we will make an adjustment for other premiums owed.

Any excess premiums paid in advance will be refunded to you in a separate check.

b. *If monthly social security benefits are not being paid to you now—*

If this is the first time your benefits are being withheld this year, you will be billed for any premiums you owe.

If your benefits were withheld earlier this year, we will not bill you now. At the end of the year, we will make an adjustment for any premiums due.

4. Information About Overpayments

If you wish to repay the overpayment by installments or have a smaller amount withheld from your social security check over a longer period of time, get in touch with any social security office.

Any overpayment must be withheld from benefits or paid back unless the following statements are true:

a. The overpayment wasn't your fault in any way and you cashed the check(s) because you thought they were correctly paid to you, *and*

b. You couldn't meet your necessary living expenses if you had to pay back the overpayment or have it withheld from your social security checks, or if it would be unfair for some other reason.

If you believe you were without fault and that you should not have to repay the money, you should call, write, or visit any social security office to discuss the matter. The people there may ask you about your assets, monthly income, and expenses to help decide whether repayment would cause you financial hardship.

[Filed Jun. 20, 1974]

JEFF SPENCE
SEATTLE LEGAL SERVICES CENTER
5308 Ballard Avenue, N.W.
Seattle, Washington 98107
Phone: (206) 789-2450

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 734-73C2

FRANCES BINER, individually and on behalf of all others similarly situated, PLAINTIFFS

vs.

CASPER WEINBERGER, individually and in his capacity as Secretary of the Department of Health, Education and Welfare, DEFENDANT

AFFIDAVIT IN SUPPORT OF PLAINTIFFS MOTION FOR SUMMARY JUDGMENT

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, FRANCES BINER, being first duly sworn, on oath, depose and say that:

I am a plaintiff in the above-entitled action.

I live at 3015 East Cherry Street, Seattle, Washington.

My sole source of income for the current year has been my monthly social security check. Until October, 1973, my monthly check was for $205.00.

I retired on December 14, 1972. I received a Social Security check for approximately $1,800.00 that month. I received a regular monthly check thereafter until October, 1973.

In the latter part of September, I received notification by mail from the Social Security Administration that I had been overpaid $2,233.60, and, consequently, my benefits would be terminated from September, 1973, through July, 1974. (A copy of that letter is attached.) My October check did not arrive.

In the middle of October I received another letter from the Social Security office. [A copy of that letter is attached.] Enclosed with that letter were forms to be filled out if I felt this termination of my checks would be a hardship.

Both of these letters were forwarded to me in Michigan where I was staying with my sister who was gravely ill with cancer. While in Michigan, I completed the enclosed forms and mailed them back to the Social Security office.

I returned to Seattle on Friday, November 2, 1973, and on the following Monday, November 6, I went to see Mr. Bennett at the local office. Mr. Bennett informed me that there was nothing more he could do to help me and that I would just have to wait for a response from the regional office.

I had not heard anything further as of November 16, 1973, and at that time I came to the Legal Services Office.

The termination of my Social Security checks has left me without any source of income. I have $131.00 in my savings account. I am buying my home and I have to make monthly payments of $103.00. My daughter has loaned me the money to meet these house payments. I receive food stamps. I pay $23.00 for $66.00 worth of food. My daughter is now paying the utility bills for me.

The loss of my monthly benefits has left me practically penniless. Without the help of my daughter, I would be in a desperate situation. Unless my checks are restored, I will suffer severe and irreparable harm.

I have never been informed of the reason for the alleged overpayment. I was never given a hearing to determine if in fact there was an overpayment, or if I was with or without fault. It has been several weeks since I filled out the forms used to determine whether or not the termination would cause me a hardship and

I have received no response. However, my benefits were terminated anyway. I have reason to believe that it will be many, many weeks, if not months, before an administrative determination is made on my request for relief. In the meantime, I am left with no income.

Therefore, I am seeking immediate relief from this court.

DATED THIS 20th day of November, 1973.

/s/ Frances S. Biner
FRANCES S. BINER
Plaintiff

Subscribed and sworn to before me
this 26th day of November, 1973.

/s/ Vera N. Jones
VERA N. JONES
Notary Public in and for
the State of Washington,
residing at Seattle.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
PAYMENT CENTER
SAN FRANCISCO, CALIFORNIA 94101

BUREAU OF RETIREMENT
AND SURVIVORS INSURANCE

REFER TO CLAIM NUMBER:

538-18-4795 A

FRANCES S BINER
3015 E CHERRY ST
SEATTLE WA 98122

DATE: SEP 21, 1973

THIS REFERS TO YOUR ANNUAL REPORT OF EARNINGS FOR 1972 AND YOUR WORK REPORT FOR 1973

WHAT YOU REPORTED

EARNINGS IN 1972	MONTHS IN 1972 IN WHICH YOU DID NOT EARN OVER $140 IN WAGES OR PERFORM SUBSTANTIAL SERVICES IN SELF-EMPLOYMENT												ESTIMATED EARNINGS FOR 1973	WORK STATUS AT TIME YOU MADE REPORT
	JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEPT	OCT	NOV	DEC		
$ 7257													$	NOT WORKING

THE STATUS OF YOUR CLAIM AS OF SEP 1, 1973

	TOTAL BENEFITS WHICH SHOULD HAVE BEEN WITHHELD TO DATE	TOTAL BENEFITS ACTUALLY WITHHELD	AMOUNT NEEDED TO ADJUST YOUR CLAIM TO DATE	AMOUNT DUE YOU	REGULAR MONTHLY BENEFIT AMOUNT
1972	$ 2233.60	$ NONE	$ 2233.60	$ NONE	$ 211.50 LESS MED. INS. PREMIUMS
1973	$ NONE	$ NONE	$ NONE	$ NONE	

A REVIEW OF YOUR REPORT SHOWS YOU RECEIVED $2233.60 MORE THAN YOU SHOULD HAVE FOR 1972. TO RECOVER THIS AMOUNT, YOUR REGULAR MONTHLY BENEFITS WILL BE WITHHELD FROM SEP, 1973 THROUGH JUL, 1974. YOU WILL THEN BE DUE A PART OF YOUR BENEFIT FOR JUL, 1974 AND A CHECK FOR $ 92.90 WILL BE SENT TO YOU SHORTLY AFTER AUG 2, 1974. HOWEVER, YOUR BENEFITS CAN BE STARTED IMMEDIATELY IF YOU REFUND THE AMOUNT DUE FOR 1972 BY CHECK OR MONEY ORDER MADE PAYABLE TO THE SOCIAL SECURITY ADMINISTRATION. PLEASE PUT YOUR CLAIM NUMBER ON THE CHECK OR MONEY ORDER.

THE ABOVE PAYMENT OF $ 92.90 MAY BE REDUCED BY ANY UNPAID MEDICAL INSURANCE PREMIUMS DUE, OR INCREASED BY ANY PREMIUMS PAID IN ADVANCE AT THE TIME YOU ARE DUE YOUR NEXT PAYMENT.

THE TOTAL BENEFITS ACTUALLY WITHHELD FOR LAST YEAR REPRESENT ONLY THE BENEFITS WITHHELD BASED ON LAST YEAR'S ESTIMATE OF EARNINGS. IT DOES NOT INCLUDE ANY BENEFITS WITHHELD TO RECOVER AN OVERPAYMENT FOR AN EARLIER YEAR.

If you have questions about your benefits, you may get in touch with any social security office. Most questions can be handled by telephone or mail. If you visit an office, however, please take this notice with you.

Paul W. Quandt

Paul W. Quandt
Director of Operations

SEE REVERSE SIDE OF THIS NOTICE

FORM SSA-L766 (12-72)

280

(1) You stop work, or

(2) You do not earn over $175 for any month and you do not perform substantial services in self-employment, or

(3) You expect to earn substantially more or less in the year than you previously told us.

Prompt reports enable us to make adjustments to your benefits payments when you have income from work. Delayed reports make it necessary for us to withhold benefits during periods when you may not have income from work.

Any difference between the amount of benefits withheld based on your estimate of earnings and the amount that must be withheld on the basis of your actual earnings will be adjusted after the close of the year when you file your next annual report.

If you have any questions about reporting, you should get in touch with any social security office.

3. Information About Medical Insurance Premiums

a. *If monthly social security benefits are being paid to you now—*

If your premiums are paid up-to-date, 1 month's premium will be withheld from your benefit check each month.

If you owe premiums for last year, the full amount owed will be withheld from your next check.

If you owe premiums only for this year, only 1 month's premium will be withheld from your next check and at the end of the year we will make an adjustment for other premiums owed.

Any excess premiums paid in advance will be refunded to you in a separate check.

b. *If monthly social security benefits are not being paid to you now—*

If this is the first time your benefits are being withheld this year, you will be billed for any premiums you owe.

If your benefits were withheld earlier this year, we will not bill you now. At the end of the year, we will make an adjustment for any premiums due.

4. Information About Overpayments

If you wish to repay the overpayment by installments or have a smaller amount withheld from your social security check over a longer period of time, get in touch with any social security office.

Any overpayment must be withheld from benefits or paid back unless the following statements are true:

a. The overpayment wasn't your fault in any way and you cashed the check(s) because you thought they were correctly paid to you, *and*

b. You couldn't meet your necessary living expenses if you had to pay back the overpayment or have it withheld from your social security checks, or if it would be unfair for some other reason.

If you believe you were without fault and that you should not have to repay the money, you should call, write, or visit any social security office to discuss the matter. The people there may ask you about your assets, monthly income, and expenses to help decide whether repayment would cause you financial hardship.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 278043 200

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

77-1511

RECEIVED
JUN 20 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., PETITIONERS

V.

EVELYN ELLIOTT AND BENITO MOLINA, ET AL.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EUDCATION, AND WELFARE, ET AL., PETITIONERS

V.

FANNIE BUFFINGTON AND FRANCES BINER, ET AL.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LEGAL AID SOCIETY OF HAWAII

STANLEY E. LEVIN
1164 Bishop Street, Suite 1100
Honolulu, Hawaii 96813

EVERGREEN LEGAL SERVICES

JEFF SPENCE
5308 Ballard Avenue, N.W.
Seattle, Washington 98107

Attorneys for Respondents

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Social Security Act, Title II, 49 Stat. 622, et seq., as amended and added, 42 U.S.C. 401, et seq.	3, 8, 9, 10, 12, 17, 24
Section 202(a)(7), 42 U.S.C. 402(a)(7)	20
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Section 204, 42 U.S.C. 404	8,9,11,18,20

2. Whether the district courts had jurisdiction to certify these actions as class actions and to issue classwide relief to all social security recipients who are affected by the challenged overpayment recoupment procedures.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment of the Constitution provides in pertinent part that "no person shall be ... deprived of ... property, without due process of law ...," while Section 204(b), 42 U.S.C. 404(b) mandates, in pertinent part, that "... there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." (See the Secretary's petition at 155A-156A for the full text of 42 U.S.C. § 204(a) and (b).)

The Secretary has issued regulations to define "without fault" (20 C.F.R. § 404.507), "defeat the purposes of this subchapter" (20 C.F.R. § 404.508), and "against equity and good conscience" (20 C.F.R. § 404.509). Those regulations are set forth in full in Appendix D of this response.

Other applicable regulations are set forth in the Secretary's petition at 145A-155A, while the relevant portions of the Social Security Claims Manual may be found in

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1/ (cont'd) to inform beneficiaries they have a right to request both reconsideration and waiver pursuant to § 204(b), and that it failed to mention the forms needed to request either type of review. Id. at 1223, text and n. 4. This conscious choice of the Secretary to attempt to keep recipients ignorant of their statutory rights to waiver is a very telling example of the Secretary's complete disdain for the dictates of § 204(b).

the petition at 119A-145A.[2/]

STATEMENT OF THE CASE

These consolidated cases were brought by Respondents, all of whom are recipients of benefits under Title II of the Social Security Act of 1935 as either "survivors" or "aged" or "disabled persons" to challenge on due process grounds the constitutionality of the procedures used by the Secretary of the Social Security Administration (the "Secretary") to recoup [3/] alleged overpayments.

At the heart of the case is the Secretary's misreading or disregard of the waiver provision of Section 204(b), which requires the Secretary to waive an overpayment whenever a recipient is without fault in causing the overpayment and recovery would either defeat the purposes of the act or be against equity and good conscience. The fundamental deficiency of the Secretary's challenged recoupment procedure is that it allows the Secretary to recoup overpayments without first determining eligibility for the waiver provisions of § 204(b).

The court of appeals modified the district courts' judgments by distinguishing, for due process purposes,

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2/ It should be noted that the regulations and claims manual were amended to comply with the orders of the lower courts in Buffington and Elliott. Consequently, portions of the overpayment procedure defended by the Secretary in his certiorari petition exist solely because of this lawsuit.

3/ The term "recoup" means to suspend or reduce current benefits to secure repayment of alleged past overpayment. The period of suspensic and the amount of reduction are unilaterally determined by the Secretary.

between "reconsideration" cases and "waiver" cases. In reconsideration cases the recipient challenges the existence and/or amount of the overpayment, while in waiver cases the recipient asserts his or her right to have the overpayment waived pursuant to § 204(b). The court concluded that prior oral hearings are not necessary in reconsideration cases unless the claimant raises an issue "in which the credibility of the claimant may be determinative of the outcome." Elliott, 564 F.2d at 1231. However, the court also ruled that § 204(b) waiver "determinations require an oral pre-recoupment hearing" (id. at 1235), unless "the claimant raises no disputed fact." (Id. at n. 21.) The court concluded that waiver determinations, which turn upon highly subjective, individualized factual determinations regarding the credibility, character, capacity and circumstances of the recipient, "cannot be properly administered without a (prior) oral hearing." (Id. at 1233.) 4/

Respondents certainly take exception to the Secretary's rather fanciful and inaccurate description of the challenged overpayment procedures. Fortunately, the records

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4/ The Secretary had unsuccessfully attempted to persuade the court of appeals that by seeking waiver, a recipient abandons his or her property interest in the benefits and thereby forfeits all due process guarantees. Totally disregarding § 204(b), the Secretary then argued that waiver became a matter of "governmental beneficence." Calling this argument "untenable", the court ruled that § 204(b) created a property right in the retention of alleged overpayments which "commands due process protection." Id. at 1230, n. 15. The Secretary has tried a new, but equally untenable argument in the petition for certiorari. At 13-14 he argues that "the Constitution does not bar the Secretary from proceeding to collection ..." in waiver cases," (emphasis added), while failing to mention the clear and unambiguous statutory mandate of § 204(b).

and the findings of the courts below give a more accurate picture of how the challenged system operates.

For example, contrast the Secretary's assertion at 13 of his petition that "the beneficiary can discuss his case with local Social Security officials who are responsible for assisting him in providing all the information necessary to evaluate his case," with the district court's finding that even though all the recipients in Elliott timely contacted their Social Security offices, "none were advised that appropriate forms requesting waiver, reconsideration, and partial adjustment were available to investigate administrative action ..." and "the information and forms missing in the initial notice are not generally made available when the claimant consults his local administration office." 371 F. Supp. at 966.

Then compare the Secretary's suggestion, also at 13, that "these procedures adequately protect the beneficiary's interest in avoiding improper reduction of payments," with the Court's findings that recoupment was completed against several of the recipients in Elliott, including Mrs. Yamasaki, and that recoupment was not halted against Mrs. Biner in Buffington, despite the fact that she submitted a request for waiver and two separate requests for reconsideration. 564 F.2d at 1224-1225.

The Secretary also claims that the "beneficiary thus knows the basis for the Secretary's proposed action and may present objections to that action before it is taken." Petition at 13. However, as the court of appeals declared regarding the inadequacy of the notice:

> Like the district court in Elliott we have serious doubts as to the adequacy of the Secretary's summary explanation of some of its overpayment determinations as the result of 'processing error.' The strictures of due process would seem to compel a more elaborate description of the type of error which gave rise to the Secretary's determination in the first instance.

Elliott, 564 F.2d at 1236, n. 22. 5/

The lower courts also found that the "opportunity to present objections" defended by the Secretary is often illusory given the age, physical capacity and/or educational background of large numbers of the recipients. See, e.g. Elliott, 564 F.2d 1233, text and n. 19. As Judge King observed:

> When reconsideration or waiver consideration is requested, the Administration's decision is based upon a claimant's ex parte presentation of documentary evidence on an issue which he may understand only nebulously. Many of these claimants are elderly and disabled people whose capacities may frustrate an effective documentary presentation of their case.

Respondents submit that the following presents a more accurate description of the challenged overpayment procedures. First, the Secretary would unilaterally determine that an overpayment had occurred and would then commence recoupment by reducing or suspending future monthly benefits. However, a recipient was usually first sent a form letter which contained an abbreviated statement of the reason for the overpayment, the availability of reconsideration, and waiver and the need to contact the Administration within

5/ For example, it is doubtful that Mrs. Yamasaki found "processing error" much help in understanding the nature of her alleged overpayment. Elliott, 371 F. Supp. at 966.

thirty (30) days if he or she wished to complain about the proposed recoupment. The reconsideration afforded was based on the written submission of the recipient. An oral evidentiary hearing occurred only after the recoupment had commenced. Moreover, such hearings generally were not held until months later and recoupment was not stayed during that time. If the request for reconsideration or waiver was rejected, recoupment would then begin, if it had not already been initiated. Only then did the beneficiary become entitled to an oral evidentiary hearing, but the recoupment continued until the overpayment was recovered or a favorable decision was rendered. The only interim relief available to the recipient was in the Secretary's absolute discretion to grant partial adjustment of the announced recoupment rate in limited cases and only if the beneficiary sufficiently demonstrated that such recoupment would work a financial hardship.

PROCEEDINGS BELOW AND PRESENT POSTURE OF THE CASE

The proceedings below and the present posture of this case are accurately set forth in the Secretary's petition at 5-10, 19-21. Because all requests for stays were denied, the Secretary has been holding pre-recoupment hearings since January, 1977. Petition at 10, n. 4, and at 19-21.

REASONS FOR DENYING THE PETITION

After remand by this Court, 425 U.S. 987 (1976), the court of appeals thoroughly examined the Secretary's procedures for recouping social security benefits due to an

alleged overpayment. It then correctly ruled that in light of the unique interest Congress created by enacting Section 204 of the Social Security Act and in view of the highly subjective and individualized factual inquiries required both under § 204 and the Secretary's regulations, due process required the Secretary to provide this limited class of social security recipients with an opportunity for an oral pre-recoupment hearing. For the reasons stated herein, this decision of the court of appeals is a proper balancing, under this Court's decision in Mathews v. Eldridge, 424 U.S. 319 (1976), of the applicable private and governmental interests.

This response to the Secretary's petition for certiorari shows that the petition should be denied since it fails to establish any grounds for this Court to exercise its discretionary jurisdiction as required by this Court's rules, see Rule 19, in that (1) there is no conflict in the courts of appeals on this issue and/or (2) the court of appeals decision is entirely in harmony with applicable decisions of this Court.

A. THERE IS NO CONFLICT OF DECISIONS TO ENTITLE THE SECRETARY TO REVIEW

Denial of the petition at this time is proper because the Secretary has failed to show a "conflict with another circuit court of appeals on the same matter." Rule 19(b). The Secretary in his petition does not, and he cannot, show any conflict in the circuits on this issue.

In lieu of establishing the conflict required by this Court's rules for purposes of obtaining certiorari review, the Secretary relies on the fact that the court of appeals decision in this case affirmed the granting of

nationwide class relief which, somehow the Secretary claims, insulates the issues here from review by this Court.

This contention is clearly wrong for several reasons. On the one hand, the class definition in this case specifically excludes persons involved in on-going litigation on the same issue, see e.g. Mattern v. Mathews, 427 F. Supp. 1318 (1977), appeal pending Civil No. 77-1629 (3d Cir. 1977). On the other hand, on this point the petition argues against itself: since the Secretary can establish no present conflict as required, the petition should be denied at this time and the Secretary should seek review of the decision in Mattern v. Mathews, if it is contrary to the decision of the court of appeals here. Indeed, the Third Circuit Court of Appeals will soon decide the Mattern case and only if there is a conflict in appellate decisions at that time would review by certiorari be appropriate. If anything, the petition not only establishes no required conflict of decisional law, but it also shows that its filing is premature.

B. THE COURT OF APPEALS DECISION IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT

The court of appeals, after thoroughly examining the Secretary's recoupment procedures, concluded that those procedures were unreliable, unfair, and illegal. In so deciding, the court of appeals was careful to limit its ruling to only those social security recipients, whom Congress intended, by enacting Section 204 of the Social Security Act, clearly to protect. Indeed, the court of appeals specifically emphasized that but for the mandate of Section 204 and its "waiver" inquiry, which is not present under any other provision of the social security program, the court would not have determined that an opportunity for an

oral pre-recoupment hearing is constitutionally required. In short, contrary to the Secretary's assertion, Petition at 11, the court of appeals did not extend prior rulings of this court; it merely applied those prior decisions to this unique statutory scheme.

In the face of such a ruling, the Secretary argues that this court of appeals decision is "inconsistent with the analysis of Eldridge." Petition at 11. Such a contention is patently wrong. In Eldridge, this Court ruled that the Secretary's procedures for terminating disability recipients under Title II of the Social Security Act were constitutionally valid even though the Secretary did not provide for an oral pretermination hearing. In so ruling, this Court articulated the three factors which must be considered in analyzing the dictates of due process -- they are:

> . . . first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. 424 U.S. at 335.

After analyzing the Secretary's procedures in light of these factors, this Court determined that those procedures were minimally acceptable because of their "very elaborate" character; the "routine, standard, and unbiased" nature of the reports on which the termination decision was based, and the significant governmental burden to provide pretermination disability hearings.

Adhering strictly to this three prong Eldridge analysis, the court of appeals here properly balanced the competing governmental and private interests and determined that the Secretary's recoupment procedures were fatally flawed.

1. One of the factors of the Eldridge analysis is a balancing of the public interest at stake in recoupment decisions, including the function involved and the fiscal burden that those additional safeguards entail. For several key reasons upon applying the Eldridge public interest analysis to the case at bar, it is clear that it is in the public's interest for the Secretary to provide prerecoupment oral hearings. First, unlike Eldridge, in this case there is the strong, unqualified congressional mandate of § 204(b) to protect needy, innocent recipients, like Respondents in this case. That section provides, in pertinent part, that:

> . . . there shall be no adjustment or payment to, or recovery by the United States from any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

Originally enacted in 1939 to "make more equitable recovery by the federal government other than correct payments to individuals," H.R. Rep. No. 728, 76th Congress, 1st Session (1939), § 204 was amended in 1967 to broaden the waiver of adjustment or recovery to include persons who are without "fault" and unable to repay. See H.R. Rep. No. 544, 90th Cong., 1st Sess. 2, reprinted in U.S. Code Cong. & Ad. News, 1967, at 3095. The legislative history accompanying this amendment makes it absolutely clear that Congress intended to grant these persons a right to the overpaid money unless the government can show that they were at fault and/or

could not repay that money. Id. at 3096.

In implementing this congressional mandate, the Secretary has promulgated regulations which further define such crucial statutory terms as "fault," "defeat the purpose of the Social Security Act," and "against equity and good conscience." See, e.g., 20 C.F.R. §§ 404.507, 404.508 and 404.509 (1977). Those regulations require the Secretary, in making the decision on whether to waive an overpayment, to weigh very subjective, highly individualized factors such as the recipient's age, intelligence, education, and physical and mental conditions, in addition to "all (other) pertinent circumstances." 20 C.F.R. § 404.507. Additionally, these regulations require an inquiry into the recipient's financial situation, i.e., his/her ability to repay the debt, 20 C.F.R. § 404.508. Thus, unlike the Eldridge procedures and the public interest balanced there, in the instant case Congress has expressed the strong opinion that in certain specified circumstances, the Secretary shall not recoup unless he provides recipients with the proper protections to assess their individualized factors. No such expression of public interest was present in Eldridge.

Another important difference of public interest here is that there is no reason to assume that there would be significant increase in the number of hearing requests, or that the Secretary has a strong fiscal interest in not providing pre-recoupment oral hearings. While the Secretary's recently disclosed statistics presented in his petition are irrelevant to show the reliability of his challenged procedures, they are very helpful in demonstrating the minimal administrative burden imposed by the injunctions in

this case. Indeed, the Secretary's statistics show an insignificant $100,000 per year cost to provide all the relief sought by Respondents.

In an attempt to inflate this $100,000 figure, the Secretary alleges several, other administrative burdens and "indirect" costs which he claims will result in great cost by complying with the decision of the court of appeals. These extra "indirect" costs are either inflated, erroneous, or highly speculative.[6/] First, the Secretary claims that the $100,000 figure does not include "losses incurred because of inability to recoup overpayments after a prolonged pre-recoupment period." Petition at 21. This is a highly speculative cost, if it exists at all, because, as the facts of the recipients show, the Secretary is entirely secure as to recovering costs. In the vast majority of overpayment cases, since it is a not question of a continued eligibility but the timing of the recoupment, if any, there is virtually no chance that an ineligible person will be paid during the waiver hearing process. Thus, the Secretary is secure regarding collection from these persons once it is determined that he has the right to collect at all.

Moreover, the Secretary seeks to claim as indirect costs, the monies allegedly overpaid to the recipients and the interest, if any, on that money. This is certainly erroneous because these are funds which Congress intended to be waived and, thus, would be at issue even under the

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6/ Indeed, this Court should be very wary of such cost estimates by the Secretary in light of astounding variance between the $100,000 figure offered in this petition and the artificial cost estimate of $15-40,000,000 which the Secretary claimed before the court of appeals. See Appendix E herein.

challenged procedures. Also, the Secretary asserts that there is an "indirect" cost for the diversion of resources, which could be used by the Social Security Administration, not for pre-recoupment hearing but for other, unspecified needs. Petition at 21. The Secretary's statistics belie this contention. The court-ordered safeguards in Elliott have improved the decision-making by reducing the error rate by approximately 25%. That is, 25% fewer errors are being made under the present system than under the previous one. This is borne out by the Secretary's own statistics at page 21 which show a 50% reversal rate at the waiver determination stage now as opposed to the nearly 75% rate which Judge King found in Elliott. 371 F. Supp. at 967.

Furthermore, not only is the dollar cost to comply with the court of appeals decision negligible but also the numbers of hearings requested are very modest. Again, using he Secretary's belated statistics in its petition, he shows only 1,200 personal conferences, i.e. oral pre-recoupment hearings, requested during the calendar year 1977. Petition at 21. Not only is this a very small number of hearings, but the Secretary ignores the fact that these hearings would be held even under the challenged procedures, so surely they cannot fairly be labeled an additional cost.

Like Goldberg, and unlike Eldridge, such a pre-recoupment waiver hearing is invaluable for the decision-maker to confront the recipient in order to assess his/her culpability, needs and credibility. This can be accomplished readily by the type of procedure presently employed by the Secretary, a short personal conference with an impartial employee of the Social Security Administration at which time

the recipient presents testimony and evidence and the administrative employee questions the recipient. Such a procedure is the same one successfully and effectively now employed by many administrative agencies to determine for example, eligibility for welfare, unemployment compensation and food stamps. The administrative costs, both in terms of money and personnel, are small, while the administrative gain, in terms of reliability and efficiency in decision-making is great.

For these reasons, it is clear that the public interest will be well served by requiring the Secretary to conduct pre-recoupment oral hearings. The importance of the minimal fiscal impact on the Social Security Administration, coupled with the insubstantial inconvenience to the Secretary's existing bureaucracy pales when compared to the often devastating impact the present procedures have on large numbers of recipients who have suffered or will suffer from recoupment pending the waiver determination.

2. The court of appeals also properly evaluated the risk of erroneous deprivations under the Secretary's challenged recoupment procedures and correctly determined that an opportunity for an oral pre-recoupment hearing was vital. Contrary to the Secretary's petition, this conclusion is entirely in harmony with the Eldridge decision.

In Eldridge, this Court reviewed procedures in which the Secretary made an initial determination of eligibility after that determination had been previously reviewed by a separate state agency and based solely on reports which were "routine, standard, and unbiased." Here, the decision-making process and the information used in that process is significantly different. The Secretary makes an ex parte

determination of an alleged overpayment but this is not the issue to be reviewed at a pre-recoupment hearing. Rather, at the hearing, the recipient seeks an initial ruling on whether the overpayment should be waived pursuant to § 204(b). Unlike Eldridge when the beneficiary was involved in the decision-making process from the outset on the issue which was critical to that beneficiary, (i.e., whether he/she was "disabled"), here the Secretary makes no initial waiver decisions until he receives the respondent's individualized input about "fault" and "ability to repay." This process under § 204(b) is a recognition that the recipient's input is a necessary predicate for a proper waiver decision.

Furthermore, again unlike Eldridge, the waiver question requires the assessment of fundamentally different evidence and the application of highly subjective legal standards. In order to make a waiver determination, the decision-maker must analyze and weigh the very individualized and personalized evidence which is determinative of whether a recipient is "at fault" in causing the overpayment and whether he/she is able to repay.[7/] It is uncontestable that this "fault" determination requires an oral hearing at which the decision-maker can confront the recipient and is able to gauge his/her credibility. For example, such a proceeding would have been invaluable for Mrs. Yamasaki since the Secretary had determined that she owed $207.90 and the

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7/ The subjective nature of the inquiry is exemplified by the fact that under the Secretary's regulations, a recipient may still be at fault "even though the Secretary may have been at fault in making the overpayment," 20 C.F.R. § 404.507(c), or if he/she "knew or should have known" an overpayment would occur from his/her receipt of excess benefits. This is contrary to the Secretary's bald and unsupportable assertion that waiver questions are simply more "diffuse." Petition at 18.

stated reason was that it was due to the Secretary's "processing error." The only fair means for the Secretary to evaluate whether Mrs. Yamasaki "knew or should have known or could be expected to know," 20 C.F.R. § 404.507, about the incorrect payment is through an oral hearing at which he/she is questioned and testifies. [8/]

Similarly, once the thorny credibility-based "fault" issue is resolved, the Secretary then must determine whether it would be "against equity and good conscience" or "defeat the purposes of (Title II)." This evaluation, as detailed by the Secretary's regulations, 20 C.F.R. §§ 404.508 and 509, requires an in-depth analysis primarily of the recipient's financial need; the state of the recipient's knowledge about his entitlement to the overpayment monies; and a factual/credibility determination of whether the recipient detrimentally relied on receipt of the overpayment. Again, this is

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8/ Indeed, the importance of the pre-recoupment oral hearings in this context was specifically noted by the court of appeals as follows:

> While the Administration conceded that Mrs. Biner may not have been at fault in receiving the overpayment checks in 1972, it nonetheless believed that the letter enclosed with the first check sent to Biner and the fact that she received checks while she was employed put her on notice that continued retention of those checks was improper and precluded a finding on its part that she was "without fault" within the meaning of the Social Security Act. However, whether Biner knew that she was not entitled to these checks seems to be a matter difficult to resolve without hearing her side of the story. Finding fault on the basis of the ambiguous letter enclosed with the first overpayment check sent her, without giving her an opportunity to explain in person what she thought it meant, is simply inadequate. 564 F.2d 1219.

clearly the type of evidence which goes far beyond the "routine, standard" medical reports at issue in Eldridge. Because of these critical differences in the evidentiary and legal standards, the court of appeals properly ruled that the Secretary's recoupment procedures were illegal.

Another relevant factor under the Eldridge analysis is the relative reliability of the existing procedure. In assessing the value of statistics in Eldridge, this Court stated that "statistics rarely provide a satisfactory measure of the fairness of the decision-making process." Eldridge at 346. A further caution is necessary since the Secretary belatedly offers statistics in his petition which were not presented to the court of appeals. Clearly, the proper yardstick under Eldridge is not the reliability of court-ordered changes. Consequently, the Secretary's proferred statistics, at pages 19-20 of the Petition, are an invalid measure of the relative reliability of his challenged procedures because those statistics are based on his experience under the improved, court-ordered procedures. For the purposes offered by the Secretary, his belated statistics should be ignored.

Before the court of appeals, the Secretary claimed, as he does here, that because there was a low "overall" number of recipients who had obtained successful relief, the procedures were reliable. Petition at 14-20. However, the Secretary wrongly draws from the entire overpayment population and not from those who actually sought waiver. Since the Secretary makes no waiver determination until asked by the recipient and since § 204 grants the rights of waiver to every overpaid recipient, this distinction is crucial and it shows the unacceptably high error rate prior to the decisions

in this case. That is, there is almost a 75% error in the pre-Elliott procedures.[9/] This is a far more staggering error rate than was presented in Eldridge where this Court found that disability termination procedures produced between a 3.3% and 12.2% error rate. 424 U.S. at 346, n. 19b. In light of these statistics, it is evident that the Secretary's challenged procedures allowed him to reduce or suspend social security payments when, in view of Section 204(b), he absolutely has no right to do so. Nothing in Eldridge alters the conclusion that the Secretary's procedures are highly unreliable and it is only through pre-recoupment oral hearings that proper safeguards will be provided.

3. Finally, regarding the respective interests at stake here, the court of appeals properly rejected the same contentions that the Secretary asserts in his petition, i.e., that the private interest here is not as significant as that in Eldridge. Petition at 15. The facts, as found by all of the courts below, and the Secretary's practice belie this

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9/ Specifically, Judge King, in Elliott, found that in 1970 (the latest figures available at that time) the reversal rate was over 73%. That is, of the estimated 12,000 requests for reconsideration and waiver, over 8,000 finally succeeded in obtaining full relief. 371 F. Supp. at 967. Also, in light of the actual findings by all of the lower courts, it is very likely that this group would be larger if the Secretary adequately informed recipients of their rights to waiver and reconsideration (the Secretary's form notice was found to be constitutionally invalid) and if the Secretary facilitated filing for reconsideration and waiver (recipients were not provided with waiver and reconsideration forms and even when submitted, they did not toll recoupment). Given the inadequacies of the Secretary's notice and the difficulties for recipients to initiate the reconsideration/waiver process, these figures are very dramatic, for undoubtedly these failures of the system discouraged or thwarted many recipients from exercising their right to waiver.

claim. It is undisputed in the record that it is the Secretary's regular practice to suspend benefits entirely, and only later make "partial adjustments" described at page 15 of the Petition. While the length of the period of suspension varies with the amount of the alleged overpayment and the recipient's monthly entitlement, there can be no question that these suspensions of benefits had devasting effects on each of the named recipients in this case. For example, Mr. Jordan Silva sought welfare assistance from the State of Hawaii because he and his wife could not meet their minimum subsistence needs. Predictably, because of the very restrictive eligibility standards for state welfare assistance, the Silvas were denied any financial help. Of the plight of such persons directly subjected to the Secretary's recoupment procedures, the district court stated that these recipients were in "brutal need" in the Goldberg v. Kelly, 397 U.S. 254 (1970), sense because:

> Starvation may be slower if benefits are reduced or suspended rather than terminated in Goldberg, but some recipients will suffer nonetheless. 371 F. Supp. at 970.

Moreover, the Secretary is equally incorrect in stating that financial need is irrelevant here. Financial need is central to the waiver question and to the issue of continued eligibility for either retirement or survivor's benefits. For example, as the court of appeals found, retired social security recipients are "taxed" for each dollar they earn above the statutory maximum. This "tax," the appellate court found, was very "similar to that found in many welfare programs," See generally 42 U.S.C. §§ 402(a)(7) and (8) (1977). In establishing financial need as an essential inquiry in the waiver determination under Section 204

and an important factor in continued eligibility of retirees and survivors, Congress treated respondents more like the welfare recipients in Goldberg rather than the beneficiaries of the pure insurance program at issue in Eldridge. Thus, the court of appeals correctly decided that respondents private interests under § 204(b) are greater than those scrutinized in Eldridge.

4. The court of appeals found that this case was appropriate case for the exercise of mandamus jurisdiction, for the named recipients and the unnamed class members. In his petition the Secretary disagrees, of course, relying on the recent decision in Califano v. Sanders, 430 U.S. 99 (1977). Petition at 23. However, the court of appeals correctly rejected the Secretary's reliance on Sanders, noting that the issue of the propriety of mandamus jurisdiction was not decided by this Court in that case.[10/]

Apparently, the Secretary does not dispute the court of appeals' conclusion that Elliott was a "traditional" due process case in that respondents were asking the court to require the Secretary to perform a purely ministerial (albeit constitutionally mandated) duty. Rather, the Secretary argues that 42 U.S.C. § 205(h) and (g) preclude mandamus

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10/ As the Elliott court observed, 564 F. 2d. at 1226-1227, the question of § 1361 jurisdiction was not before the Court in Califano, and it had been specifically left open even after argument in Eldridge, 424 U.S. at 332, n. 12. Furthermore, in the very next sentence in Califano this Court stated:

> Thus those cases merely adhered to the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extra-ordinary' step of foreclosing jurisdiction unless Congress intent to do so is manifested by 'clear and convincing' evidence. (Citation omitted.)

jurisdiction over any social security issue, including respondents' due process claims at issue here. Petition at 22-24.

Respondents submit that the Secretary's argument overlooks the critical distinction made by the court of appeals between this case and this Court's decision in Weinberger v. Salfi, 422 U.S. 749 (1975). As the Court there noted:

> The instant suits are quite different ... They are not claims for benefits. Nor would granting the relief sought result in an entitlement to benefits. The distinction between due process questions divorced from a claim for benefits and questions related to the merits of a benefits claim is a significant one, requiring considerably different treatment by the Courts. 564 F.2d at 1226.[11/]

The Secretary can cite no other cases which support his mandamus jurisdiction argument. In fact, the courts of appeals have unanimously agreed that mandamus jurisdiction is available in cases like Elliott in which constitutional questions, rather than claims for benefits, are at issue. Ryan v. Shea, 525 F.2d 268 (10th Cir. 1975) and De Lao v. Califano, 560 F.2d 1384 (9th Cir. 1977); and White v. Mathews, 559 F.2d 852 (2nd. Cir. 1977) cert. denied sub nom, Califano v. White, 46 U.S.L.W. 3541 (Feb. 28, 1978)

11/ The court also noted the absence of "any clear and convincing evidence that Congress intended to limit mandamus jurisdiction at all by § 205(h)," Elliott, 564 F. 2d. at 1227. The court's conclusion was premised in part on the fact that § 1361 did not exist when § 205(h) was enacted. Id. at 1227, n. 12. Moreover, the court's suggestion that "Congress intended all further additions to Title 28's grants of jurisdiction to be, by the mere statutory location of those additions, subsumed within the prescription of § 205(h)," (Ibid.), is rebutted by the uncodified legislation which declared that, "No inference of a legislative construction is to be drawn by reason of the chapter in Title 28 ... in which any section is placed ...." Judiciary and Judicial Procedure Act of 1948, Pub. L. 773, § 33, 625 Stat. 991 (1948).

Moreover, the sole case cited in the petition is entirely consistent with the foregoing decisional law. In Association of American Medical Colleges v. Califano, 569 F.2d 101 (D.C. Cir. 1977), relied on by the Secretary, Petition at 23, the court expressly recognized the "procedural-claim for benefits" distinction, noting that: "We realize that mandamus may become available in limited circumstances not involved here," and then cited Elliott and White v. Mathews with approval. Id. at 113.

5. Furthermore, respondents submit that regardless of the availability of mandamus jurisdiction, § 205(g), 42 U.S.C. § 205(g) (1977) provides jurisdiction for both the named recipients and the unnamed class members. While the Secre- tary concedes that the named respondents satisfied the 42 U.S.C. § 205(g) jurisdictional test announced by this court in Mathews v. Eldridge, 424 U.S. 319 (1976)[12/] he still argues that the lower courts lacked § 205(g) jurisdiction over the unnamed class members. Petition at 23. Although the court of appeals did not specifically address this issue, Elliott, 564 F.2d at 1225-26, n. 8a., respondents submit that class-wide jurisdiction does exist

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12/ In Eldridge this Court explained that the jurisdictional test under § 205(g) has two components, one of which is waivable, the other not. The non-waivable element is the requirement that a claim for benefits shall have been presented to the Secretary for decision. In the instant case the Secretary concedes that the named plaintiffs satisfied this element by filing "claims seeking to avoid recoupment," Petition at 23, but argues that some of the class members had not filed such claims, thus making 205(g) unavailable and class certification unappropriate.

The waivable element is the requirement that all administrative remedies be exhausted. Under appropriate cir cumstances the exhaustion requirement may be waived by the Secretary or deemed waived by the courts. Apparently the Secretary agrees that it is appropriate to waive exhaustion here, for the plaintiffs present "a colorful constitutional claim entirely collateral to the merits of the statutory entitlement to benefits," Petition at 23.

under § 205(g), and that these actions should properly be certified as class actions under that section.

Contrary to the Secretary's contentions, class certification in this case would not be inconsistent with the jurisdictional requirements set forth in Salfi and Eldridge for several reasons. Most importantly, the case does not involve a claim to entitlement or continued entitlement to benefits. All the class members have successfully submitted claims for entitlement. If they had not, they would not now be the subject of the Secretary's overpayment recoupment efforts. Moreover, their continued entitlement to benefits is not at issue in an overpayment proceeding, a proceeding entirely collateral to establishing claims for entitlement.

To require the class members to submit additional claims seeking to avoid recoupment, as urged by the Secretary, would be to require entirely superfluous acts. As this Court noted, the underlying purpose served by requiring the filing of a claim for entitlement is to allow "the Secretary the opportunity, prior to constitutional litigation, to ascertain ... that the particular claims involved are neither invalid for other reasons nor allowable under the other provisions of the Social Security Act." Salfi, supra, at 762. Here, there are no "other reasons" or "other provisions" available to the Secretary in the overpayment recoupment process, where the only possible issues are whether an overpayment occurred, the amount of such overpayment, and the recipient's eligibility for waiver.

Secondly, this case is distinguishable from Eldridge in that the class members here did not receive adequate

notice about the nature and availability of the reconsideration and waiver procedure. Under the circumstances, it would be fundamentally unfair to rule that § 205(g) jurisdiction does not exist for those recipients who failed to exhaust their administrative remedies, since the failure to exhaust was often due to the inadequacy of the Secretary's notice procedure.[13/]

6. The Secretary also wrongly claims that § 205(g) precludes the grant of injunctive relief to individuals as well as classes. The same argument was raised but not ruled on in Norton v. Mathews, 427 U.S. 524 (1976). Here the court of appeals also questioned but did not rule on this issue. Elliott, 564 F. 2d at 1225-1226, n. 8A. However, the three appellate courts which have ruled on the issue have all specifically rejected the Secretary's argument. Jimenez v. Weinberger, supra, at 694-695; Johnson v. Mathews, supra, at 1125; and In Re Letourneau, 559 F.2d 892 (2d Cir. 1977).

Respondents submit that these decisions are consistent with both long-standing decisional law and common sense. Under the Secretary's theory, it would be impossible

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13/ The court of appeals also properly rejected the Secretary's argument that this Court's decision in Salfi required a reversal of the class certification. In so doing, the court first noted that since the class included only those who had been denied because of the challenged section of the Act, it excluded those "whose applications could have been or were rejected for other reasons as well." 564 F. 2d at 1226-27.

Here, respondents' class is defined as consisting only of all those who have been denied solely because of the challenged practice of the Secretary. Accordingly, there is no possibility that any of the unnamed class members "could have been or were rejected for other reasons as well." Jimenez, 523 F. 2d. at 695, n. 10. These recipients have claims which require no further agency action for their resolution, and, consequently it is proper to waive the § 205(g) exhaustion requirement for all the class members, and to conclude that this class should include all those who are subject to the Secretary's challenged overpayment recoupment practice.

to certify a class action to review his overpayment recoupment procedures. The ultimate folly of this argument should be readily apparent in view of the nearly 1,250,000 overpayments per year which the Secretary claims he processes. As the court of appeals correctly observed:

> It would be a practical absurdity were the Secretary to provide the due process safeguards enunciated herein to the exclusion of all save the named plaintiffs. Multiplicity of actions based on the same constitutional claims advanced here would inevitably result.
>
> Obviating such unnecessary duplication is the very purpose for which Rule 23(b)(2) was designed. Maintenance of the instant case as a class action is not only proper, but it also will effectuate the interests both of judicial administration and of justice. 564 F.2d 1229-30.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

STANLEY E. LEVIN
JEFF SPENCE
Attorneys for Respondents

June 21, 1978

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 1978, I served the foregoing RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT for the Respondents by causing copies to be mailed, airmail, postage pre-paid, to:

WADE M. MCCREE, JR.
PETER BUSCEMI
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WITH THE EXCEPTION OF THE FOLLOWING APPENDIX E, ALL DOCUMENTS ATTACHED TO THIS OPPOSITION WERE REPRINTED IN MORE LEGIBLE FORM IN THE APPENDIX VOLUME AND HAVE THEREFORE NOT BEEN REPRODUCED HERE.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 74-3118
(consolidated with
No. 74-1611)

FANNIE BUFFINGTON and FRANCES BINER,
Individually and on behalf of all
others similarly situated,

Plaintiffs-Appellees,

v.

CASPAR W. WEINBERGER, Individually
and in his capacity as Secretary
of the Department of Health,
Education and Welfare,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR THE APPELLANT

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1. At the outset, we call to the Court's attention the following developments which have occurred since the filing of the main briefs in this case.

a. The Supreme Court, on January 13, 1975, has granted the government's petition for certiorari in Eldridge v. Weinberger, No. 74-204. In Eldridge, the Court of Appeals

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APPENDIX E

for the Fourth Circuit held that the Secretary's pre-termination procedures in social security cases were unconstitutional insofar as they failed to afford claimants a pre-termination oral hearing.

b. A panel of the Court of Appeals for this Circuit, on January 2, 1975, held in Knuckles v. Weinberger, No. 73-3207, that the mandamus statute, 28 U.S.C. 1361, conferred jurisdiction on the district courts to entertain cases of this type. The government is currently considering whether to seek rehearing in that case, and we will advise the Court of the government's position in this respect at oral argument.

c. The Secretary has filed an application in the Supreme Court for a stay of the district court's nationwide class order pending this appeal. Mr. Justice Douglas has requested a response from the plaintiffs to the Secretary's application.

2. The central issue in the present case is as follows: whether a full oral hearing must be routinely afforded in the more than one million overpayment cases arising each year under the social security program.[1/] The immense administrative burden resulting from such a requirement, and the attendant drain upon the trust fund following upon its implementation, is the inevitable consequence if the

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1/ In 1970 alone, there were over one million overpayment cases. (Elliott Record, p. 530.)

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district court's decision is affirmed.[2] For there can be no doubt that pre-recoupment oral hearings in vast numbers will be demanded by overpaid beneficiaries, since the prospect of such a prior hearing will necessarily delay recoupment that much longer.

On the other hand, as we have shown in our main brief, plaintiffs have wholly failed to demonstrate that such an extraordinary and costly expansion of the Secretary's procedures is justified. There is no reason whatsoever to routinely furnish pre-recoupment oral hearings in "reconsideration" cases, i.e., where the issue involves the correctness of the overpayment determination. The issues involved in such cases are easily resolved by documentary means. As to waiver cases, we have shown that there is no constitutional right to a prior hearing when the claimant asks the Secretary to forgive a conceded debt. Moreover, notwithstanding plaintiff's strenuous assertions to the contrary, the issues in waiver cases frequently require no oral hearing. Thus, in plaintiff Biner's case, she received and cashed over $2,000 in benefit checks for 1972 - monies to which she

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2/ The Secretary estimates that the initial cost of establishing the expanded system would be approximately $15 million. To maintain the system on a permanent basis could result in "an ongoing cost of up to $73 million per annum". Further losses due to uncollectible debts will increase the program's current annual loss of over $11 million. (December 12, 1974, Affidavit of James E. Forbus, Deputy Director, Bureau of Retirement and Survivors Insurance of the Social Security Administration, filed in connection with the Secretary's application in the Supreme Court for a stay of the district court's order pending the instant appeal.) A copy of that affidavit is reproduced as an addendum infra.

was not entitled because of her employment throughout that year. No oral hearing was required to establish Mrs. Biner's "fault" in retaining these funds - the matter is crystal clear. Indeed, the administrative law judge, when the case did go to an oral hearing, sustained the Secretary's initial determination that Mrs. Biner was at fault in failing to return these checks to the government.

We stress further that the very statistics relied upon by plaintiffs in their brief (Br. pp. 31-32) amply demonstrate the sufficiency of the Secretary's existing procedures in resolving waiver controversies. Thus, in 1972, the Secretary granted nearly 50 percent of the waiver requests submitted to him in documentary form.[3] Moreover, in 1970, over three-fourths of all pre-recoupment claims submitted to the Secretary were granted. (Elliott record, p. 530). In view of these circumstances, it is absurd to contend that the Secretary's procedures are not fundamentally fair. These considerations alone demonstrate that the challenged procedures are fully adequate to deal fairly and responsibly with waiver claims having a reasonable basis in fact. Doubtless, there are some valid waiver disputes remaining which are denied at the pre-recoupment stage, and are ultimately vindicated at a subsequent oral hearing. But the question at bar is whether, by reason of some meritorious cases, the social

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3/ Of a total of 41,221 claims of waiver, 20,841 were found to be without fault (R. 154).

security trust and is to be required to bear the cost of providing oral hearings in every overpayment case prior to recoupment. When the number of such cases exceeds one million annually, the Secretary's decision to begin recoupment at the conclusion of the documentary stage is hardly unreasonable. Finally, we would note that the Secretary's pre-recoupment system contains the additional safeguard of preventing financial hardship by reducing the amount withheld to conform to the claimant's financial circumstances (thus, pursuant to plaintiff Biner's request, only $50 a month was deducted from her benefit check). We do not have, therefore, the drastic consequences which would ensue if all benefits were suddenly terminated (compare Goldberg v. Kelly, where the welfare claimants were abruptly deprived of all public assistance at the pre-termination stage).

There is no merit to plaintiffs' contention (Br. pp. 8-14) that 42 U.S.C. 404(a) and (b) forbid a preliminary adjustment pending an oral hearing. Those statutory provisions require the Secretary to recover overpayments after he "finds" that an overpayment has been made. The statute also provides that "there shall be no adjustment of payments" against a claimant "who is without fault . . . ." Plaintiffs are plainly wrong in asserting that the Secretary has not made the findings prescribed by the statute. The findings have been made, but are subject to review after a hearing if the claimant appeals, as is true under various administrative

schemes. See e.g., Arnett v. Kennedy, 416 U.S. 134 (1974), Crow v. California Dept. of Human Resources, 490 F. 2d 580 (C.A. 9, 1973),[4/] Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). Plaintiffs erroneously maintain that Congress intended, by these statutory provisions, to forbid non-final recoupments pending an oral hearing. But the statute, of course, says no such thing; there is no reference whatsoever to the procedures to be followed in recoupment cases (see Mills v. Richardson, 464 F. 2d 995, 1001 (C.A. 2, 1972)). We hardly think that Congress, in the absence of an express declaration to the effect, intended to prevent the preliminary withholding of federal funds when, as here, the circumstances plainly justify it. All that Congress could have intended by the provisions relied upon by plaintiffs is that the Secretary, in implementing the statute, establish procedures which comport with the Constitution. Mills v. Richardson, supra. The Secretary has met that requirement here.

Accordingly, the Secretary's procedures amply satisfy due process, and the judgment of the district court should be reversed.

4/ A petition for certiorari is pending before the Supreme Court in this case.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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JANUARY 1975.

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 1975, I served the foregoing Reply Brief for the Appellant by causing copies to be mailed, air mail, postage prepaid, to:

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S.L. 15 PAGE 72

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

77-1511

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., PETITIONERS

v.

EVELYN ELLIOTT AND BENITO MOLINA, ET AL.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., PETITIONERS

V.

FANNIE BUFFINGTON AND FRANCES BINER, ET AL.

RESPONDENTS' SUPPLEMENTAL RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT; APPENDIX A

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INTRODUCTION

Respondents file this supplemental brief in response to the Secretary's certiorari petition in order to bring to the attention of the Court the case of Mattern v. Mathews, _____ F.2d _____, 47 L.W. 2045. (3rd Cir. June 30, 1978) (Slip Opinion attached), which was decided approximately one week after Respondents' initial response was filed.[1/] The issues in Mattern and Elliott are identical in every material aspect, and, as will be discussed more thoroughly below, the Third Circuit's recent opinion is in accord with the decision rendered by the Ninth Circuit in Elliott.

Respondents submit that it is now clear that the Secretary cannot establish any grounds for the exercise of this Court's discretionary jurisdiction. Consequently, the petition for certiorari should be denied because there is no conflict in the courts of appeals on the issues which the Secretary seeks review, and these two appellate decisions consistently and correctly applied the "balancing of interests" test mandated by this Court in Mathews v. Eldridge, 424 U.S. 319 (1976).

1/ In Mathews v. Mattern, 425 U.S. 987 (1976), this Court vacated and remanded the Third Circuit's original Mattern decision, Weinberger v. Mattern, 519 F.2d 150 (3rd Cir. 1975) for reconsideration in light of Mathews v. Eldridge, 424 U.S. 319 (1976).. On remand the district court reversed its earlier decision, Mattern v. Mathews, 377 F. Supp. 906 (E.D. Pa. 1974), and ruled that the Secretary's challenged overpayment procedures did satisfy due process requirements. That decision was appealed, and on June 30, 1978, the Third Circuit reversed the district court, substantially reaffirming its original decision.

The Third Circuit had originally ruled that prior oral hearings in "reconsideration" cases were required only in those instances in which the credibility of the recipient was at issue, without attempting to define or describe when that exception should be applied. However, in the recent opinion the court concluded that the "credibility" exception was not mandated in reconsideration cases, while reaffirming that prior hearings were required in all waiver cases. (Slip Opinion at 2).

ARGUMENT

BECAUSE THE MATTERN DECISION IS ENTIRELY IN HARMONY WITH THE ELLIOTT DECISION, THE SECRETARY CAN SHOW NO GROUNDS FOR THIS COURT TO GRANT CERTIORARI.

Under the rules of this Court, in order to be entitled to review by certiorari, the Secretary must show either a conflict in the courts of appeal on the issues on which he seeks certiorari or a significant inconsistency between the Elliott decision and prior decisions of this Court, i.e. Eldridge v. Mathews. In their initial response to the petition for certiorari, Respondents showed that the Secretary failed to establish any of the minimum grounds for certiorari in this case. As will be discussed further below, the recent Mattern decision by the Third Circuit Court of Appeals further supports that conclusion.

Briefly discussed below are the issues addressed in Mattern on which the Secretary seeks certiorari in Elliott. From this discussion, it is unquestionable that the decision of the Ninth Circuit Court of Appeals in Elliott and the decision of the Third Circuit Court of Appeals in Mattern are wholly consistent and virtually indistinguishable.

A. Jurisdiction.

The Third Circuit ruled that jurisdiction over Mrs. Mattern's due process claims existed under section 205(g), finding that the claimant had presented a claim for benefits and that the requirement of a final decision after a hearing had been waived. Critical to the court's waiver determination was the finding that "Mrs. Mattern's assertion of the right to a prior hearing is collateral to her claim for benefits," and the conclusion that her "interest in having the constitutional issue resolved

promptly is so great that further deference to agency procedures is inappropriate," (Slip Opinion at 10), citing Mathews v. Eldridge, supra, at 330. This conclusion is exactly the one reached by the Ninth Circuit Court of Appeals in Elliott.

B. Class.

The district court certified a district-wide class in the first Mattern decision, but on remand, the district court refused to certify a class, apparently basing its decision on its interpretation of Weinberger v. Salfi, 422 U.S. 749 (1975). However, the Court of Appeals ordered the district court to reconsider the class question in light of that court's decision in Liberty Alliance of the Blind v. Califano, 568 F.2d 333 (3rd Cir. 1977), in which the court ruled that a class action could be maintained under section 205(g). Again, in adhering to the Liberty Alliance ruling, the Mattern court decided this issue in harmony with the decision in Elliott.

C. Merits.

The fundamental question in both Mattern and Elliott is whether Social Security recipients who have requested the statutorily mandated waiver provisions of 42 U.S.C. § 404(b) are entitled to oral evidentiary hearings before the Secretary begins recoupment action for past overpayments. Both courts have answered that question in the affirmative, and the two decisions are consistent in that regard. Adhering fully to its original decision, the Third Circuit ruled that "the due process clause requires a pre-recoupment claim of entitlement to 'waiver' or recoupment under § 204(b)." (Slip Opinion at 22).

In Mattern and Elliott the courts consistently applied the three-part balancing test set forth by this Court in

Eldridge, and reached the same results. First, in examining the private interest involved, the Mattern court rejected the district court's conclusion that the private interest in Mattern was less than the private interest at stake in Eldridge, declaring that "the private interest, particularly in the 'waiver' cases, falls between that considered in Eldridge and that in Goldberg." (Slip Opinion at 13-14; citing Elliott at 1231.) In reaching that conclusion, the court, like the court in Elliott, found that, unlike Eldridge, "the benefits in this case are in part need-based," (citing Elliott at 1231), and that "when a waiver is erroneously denied by the Secretary prior to a hearing, the recipient faces a particularly severe impact." (Slip Opinion at 13).

The second element of the Eldridge test is the "fairness and reliability of the existing...procedures, and the probable value, if any, of additional procedural safeguards," Eldridge supra, at 343. The Mattern court reaffirmed its previous conclusion that "reconsideration cases are generally well-suited to resolution by documentary proof," (Slip Opinion at 15), but that waiver cases, which often involve "a complex analysis of facts and of credibility" relating to fault, financial dependence, and detrimental relieance, require pre-recoupment oral hearings. (Slip Opinion at 15; Elliott at 1232-1234). The presence of these issues in waiver cases caused the Mattern court to distinguish between waiver cases and the disability termination cases at issue in Eldridge regarding the importance of prior oral evidentiary hearings. The court declared that "the most substantial difference between the recoupment procedure and the termination of disability is the value of a prior hearing to the fact-finding which the Secretary must perform." (Slip Opinion at 21). This conclusion is wholly consistent

with Elliott.[2/]

In addressing the third element of the balancing test, the government's interest, the Mattern court noted two critical distinctions between this case and Eldridge, which supported its conclusion, and the one in Elliott, that requiring pre-recoupment hearings would not unduly "impinge" upon the administration of the Social Security program. (Slip Opinion at 18). First, noting that "only 1,212 persons (out of 23,345 whose waiver requests have been denied) availed themselves of the right to a (prior hearing) before their benefits were reduced," and that "the Secretary has not argued that this number is expected to rise," (citing Elliott at 1235) (Slip Opinion at 19, n. 12), the court concluded that an assumption similar to the one made in Eldridge about the threatened increased burden on the Administration would not be proper. Indeed, the figures introduced by the Secretary in his certiorari petition in Elliott (1250 hearings at a cost of approximately $100,000) confirm that conclusion. (Petition at 21). Second, the Third Circuit agreed with the Ninth Circuit in concluding that, unlike Eldridge, in an overpayment recoupment case there is far less likelihood of irretrievable loss of erroneously paid benefits. In Eldridge the Secretary was faced with having to pay continuing benefits to ineligible recipients who would eventually be terminated, thus making collection of any overpayments much more difficult.

2/ Specifically, the Elliott court concluded at 1234 that: "...most of the factors involved in a waiver determination are not capable of resolution by written submissions. Therefore, the Secretary's current procedure for handling waivers creates an undue likelihood of erroneous deprivation, which could be obviated by pre-recoupment oral hearings."

The Mattern court correctly noted that, by contrast, in Mattern and Elliott the Secretary was being asked to merely delay recoupment from recipients who, in the vast majority of cases, would continue to recieve benefits from which overpayments could be recouped at a later date. See Elliott at 1235.

Consequently, after applying the three-part Eldridge analysis, the Mattern court, like the Elliott court, concluded the Secretary's challenged recoupment procedures are illegal and violate applicable due process requirements of providing social security recipients with a meaningful opportunity to be heard.

CONCLUSION

Respondents submit that Mattern and Elliott are consistent with each other and consistent with this Court's decision in Eldridge. It is now readily apparent that the Secretary cannot show a "conflict with another court of appeals on the same matter" as required by Rule 19(b), and that decision of the Ninth Circuit is in complete harmony with the applicable decisions of this Court. Consequently, the petition for certiorari should be denied.

DATED: August 15, 1978

Respectfully submitted,

JEFF SPENCE

STANLEY E. LEVIN

Attorneys for Respondents

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 77-1629

ARLENE M. MATTERN,

Appellant,

v.

F. DAVID MATHEWS, Secretary of Health, Education and Welfare,

Appellee.

Appeal from the United States District Court
For the Eastern District of Pennsylvania
D.C. Civil No. 72-2522

Argued February 17, 1978

Before GIBBONS, HUNTER, Circuit Judges
and STAPLETON, District Judge*

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* Honorable Walter K. Stapleton, United States District Judge for the District of Delaware, sitting by designation

APPENDIX A
582 F.2d 248 (Not reproduced here).

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

77-1511

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

V.

EVELYN ELLIOTT, ET AL.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

V.

FANNIE BUFFINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' MOTION TO DISMISS OR REMAND

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 77-1511

JOSEPH CALIFANO, SECRETARY OF HEALTH, EDUCATION AND WELFARE, PETITIONER

V.

EVELYN ELLIOTT, ET. AL.

JOSEPH CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

V.

FANNIE BUFFINGTON, ET. AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' MOTION TO DISMISS OR REMAND

Pursuant to Rule 35, respondents move this Court to dismiss the writ of certiorari granted in this case or alternatively to remand[1/] this case to the respective district courts for a determination of the effect, if any, on their previous judgments of: (1) the new Claims Manual recoupment procedures issued by the Secretary to be effective January, 1979 which are revealed for the first time in his Opening Brief; and (2) the new facts and statistics, not part of the record of this case, but included in the Secretary's Opening Brief and which are heavily relied on by the Secretary in all his legal arguments.[2/] Since the Secretary argues that these new Claims Manual procedures and facts significantly alter the balancing of the respective interests in this case, it is obvious that he is abandoning review by this Court of the current procedures which were scrutinized by all the lower courts. For these reasons, dismissal of the writ, or alternatively, remand of this case is warranted.

1/ Remand of this case must not include a vacation of the lower courts' current injunctions because to do so without first providing respondents with a meaningful opportunity to demonstrate that the Secretary's new procedures and facts do not affect the judgments in this case would work a grave injustice. Rather this Court should remand with instructions to the lower court to review, under the authority of Rule 60 of the Federal Rules of Civil Procedures, these newly disclosed procedures and facts.

I.

STATEMENT OF THE CASE

In granting the Secretary's petition for a writ of certiorari, this Court agreed to review the judgment of the court of appeals in favor of respondents on the following issues of whether: (1) the district courts properly

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2/ So as to avoid confusion all references to the Opening Brief in this motion are to the printed brief served on respondents on December 21, 1978. This brief is to be distinguished from the incomplete, typewritten brief which was filed in this Court on December 4, 1978 and served on respondents on December 11, 1978. The typewritten brief was filed some 25 days after the deadline set by this Court without the Secretary obtaining the requisite permission of this Court to file a late brief.

exercised jurisdiction over these cases under either 28 U.S.C. § 1361 or § 205(g) of the Social Security Act to grant injunctive and class relief as sought by respondents; and (2) the Secretary's procedures to recover overpayments from social security recipients were constitutionally defective insofar as they failed to provide the recipients with a pre-recoupment opportunity for an oral hearing on their statutory right to waiver under § 204(b) of the Social Security Act.[3/]

To summarize, the Secretary's recoupment procedures found to be illegal by all the courts below are as follows:

(1) the Secretary makes an ex parte overpayment decision and so informs the recipient; however he makes no initial decision regarding waiver of that overpayment;

(2) the recipient has 30 days in which to request for reconsideration of that decision. This reconsideration could include both a redetermination of whether there is an overpayment and if there is, a decision of whether recovery should be waived;

(3) during this short 30 day tolling period, the recipient may submit in writing information which

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3/ Section 204(b) provides that:

> In any case in which more than the correct amount of payments has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience. (Emphasis added.)

either contests the overpayment determination or supports a request for waiver of recoupment of the overpayment. This information is gathered by a district office of the Social Security Administration and is then forwarded to one of the seven (7) regional program centers where the ex parte waiver decision is made;

(4) reduction or suspension of the recipient's social security benefits should be tolled during this initial 30 day reconsideration/waiver period;[4/] and

(5) solely on this paper review, the Secretary initially decides the waiver question.

All the respondents in this case are recipients of either old age, disability, or survivor's benefits under Title II of the Social Security Act. All of them received the forms notices from the Secretary announcing his ex parte determination of an overpayment. All of them timely contacted the local Social Security office, i.e., within 30 days from receipt of the notice of overpayment, for the purposes of contesting both these overpayment decisions and, more importantly, to assert their statutory rights to waiver. In all cases, Respondents' efforts to contest the overpayment and seek waiver were not sufficient to halt the recoupment action proposed by the Secretary. See e.g., Elliott v. Weinberger, 371 F. Supp. 960, 966, note 14 (D. Haw. 1974).

4/ Unfortunately, while all of the lower courts found as a matter of fact that the respondents had timely sought waiver of the overpayment, recoupment was begun by withholding at least one month's benefits in each of their cases. See e.g., Elliott v. Weinberger, 371 F. Supp 960, 966, note 14, (D. Haw, 1974).

At the heart of the controversy before the lower courts was the validity of the Secretary's limited, "written submission" procedure employed to determine the highly individualized and subjective questions involved in deciding whether a recipient was "at fault" in causing or retaining an overpayment or whether recovery would cause a "hardship," i.e. be contrary to the remedial purpose of Title II of the Social Security Act. Each of the respondents was notified by the Secretary that he intended to suspend or substantially reduce their monthly social security checks because he believed that there had been an overpayment. Each of the respondents timely filed waiver requests with the Secretary, but the Secretary provided only a truncated, written submission procedure by which he would determine, pursuant to his regulations promulgated under § 204(b) (See 20 C.F.R. 404.507, 508, and 509)[5/] the credibility and detrimental reliance of each respondent in order to reach a decision on their waiver requests.

5/ These critical sections of the Secretary's regulations on "fault" and "hardship" provide as follows:

> § 404.506 When waiver of adjustment or recovery may be applied.
>
> Sections 204(b) and 1870(c) of the Act provide that there shall be no adjustment or recovery in any case where an incorrect payment under Title II (old-age, dependent's, survivor's and disability insurance benefits) or under Title XVIII (hospital and supplementary medical insurance benefits) has been made (including a payment under Section 18184(e) of the Act) with respect to an individual:
>
> (a) Who is without fault, and
>
> (b) Adjustment or recovery would either:
>
> (Cont'd on next page

In two separate actions [Elliott v. Weinberger, Civil No. 72-3629 (D. Haw. 1972) and Buffington v. Weinberger, Civil No. 734-73C2 (W.D. Wash., 1974)], respondents challenged the Secretary's recoupment procedures on the grounds that they violated § 204(b) and the due process clause of the fifth amendment. Both district courts ruled in favor of respondents. Those decisions were appealed, and after consolidating the cases, the Ninth Circuit Court of Appeals issued a decision essentially affirming those rulings. The Secretary sought a writ of certiorari from this Court. Subsequently, this Court granted the writ and remanded the case for a redetermination in light of its decision in Eldridge v. Matthews, 424 U.S. 319 (1976). On remand, the court of appeals again judged the Secretary's recoupment procedures as constitutionally defective. 564 F.2d. 1219 (9th Cir. 1977). The Secretary's second petition for writ of certiorari was granted by this Court on October 2, 1977.

5/ (Cont'd)

> (1) Defeat the purpose of Title II of the Act, or
>
> (2) Be against equity and good conscience.
>
> [32 F.R. 18026, Dec. 16, 1967]
>
> § 404.507 Fault.
>
> 'Fault' as used in 'without fault' (See §§ 404.506 and 405.355) applies only to the individual. Although the Administration may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Administration seeks to recover the overpayment from liability for repayment if such individual is not without fault. In
>
> (Cont'd on next page)

II.

THE NEW FACTS AND CLAIMS MANUALS PROVISIONS DISCLOSED BY THE SECRETARY IN HIS OPENING BRIEF REQUIRE DISMISSAL OR ALTERNATIVELY REMAND OF THIS CASE

During the past 6 years of litigation in this case, on four occasions, three different federal courts have examined and analyzed the constitutionality of the

---

5/ (Cont'd)
determining whether an individual is at fault, the Administration will consider all pertinent circumstances, including his age, intelligence, education, and physical and mental condition. What constitutes fault (except for 'deduction overpayments'--See § 404.510) on the part of the overpaid individual or on the part of any other individual from whom the Administration seeks to recover the overpayment depends upon whether the facts show that the incorrect payment to the individual or to a provider of services or other person, or an incorrect payment made under Section 1814(e) of the Act, resulted from:
(a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or
(b) Failure to furnish information which he knew or should have known to be material; or
(c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect.
[34 F.R. 14888, Sept. 27, 1969; 34 F.R. 15646, Oct. 9, 1969]

§ 404.508 Defeat the purpose of Title II.

(a) General. 'Defeat the purpose of Title II,' for purposes of this subpart, means defeat the purpose of benefits under this Title, i.e., to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs.
(Cont'd on next page)

Secretary's recoupment procedures as they were set forth in the Claims Manual, § 5500, et. seq. (his administrative handbook distributed to all of his employees and which all employees are required to follow) and on each occasion, these procedures were found unfair, unreliable and illegal. Subsequent to this Court's granting his petition

---

5/ (Cont'd)
An individual's ordinary and necessary expenses include:
(1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g., life, accident, and health insurance including premiums for supplementary medical insurance benefits under Title XVIII), taxes, installment payments, etc.;
(2) Medical, hospitalization, and other similar expenses;
(3) Expenses for the support of others for whom the individual is legally responsible; and
(4) Other miscellaneous expenses which may reasonable be considered as part of the individual's standard of living.
(b) When adjustment or recovery will defeat the purpose of Title II. Adjustment or recovery will defeat the purposes of Title II in (but is not limited to) situations where the person from whom recovery is sought needs substantially all of his current income (including social security monthly benefits) to meet current ordinary and necessary living expenses.
[32 F.R. 18026, Dec. 16, 1967, as amended at 34 F.R. 14888, Sept. 27, 1969]

'Against equity and good conscience' means that adjustment or recovery of an incorrect payment (under Title II or Title XVIII) will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right (examples (1) and (4)) or changed his position for the worse (examples (2) and (3)). In reaching such a determination, the individual's financial circumstances are irrelevant.

for a writ of certiorari, the Secretary in his Opening Brief, for the first time, reveals new Claims Manual procedures governing his recoupment system which have never been examined by any of the lower courts and which, according to the Secretary, may significantly affect the disposition of this case. He describes this new system as follows:

> Under the new Claims Manual provisions that will become effective in January 1979 (App., infra.), recoupment generally will not require more than a 25 percent reduction in monthly benefits unless the overpayment was obtained by fraud or the beneficiary still has the overpaid amount in his possession. In the absence of fraud or retention of the overpayment, the Social Security Administration will no longer propose temporary interruption of monthly benefits. Op. Br. at 31. (Emphasis added.)

Consequently, at pages 31-33 of his brief, the Secretary vigorously contends that these regulations substantially alter the private interest which the recipient has at stake in obtaining a pre-recoupment oral hearing under this Court's decision in Matthews v. Eldridge, 424 U.S. 319 (1976). Unquestionably, since the Secretary premises his entire legal argument on these new procedures and he does not address the recoupment procedures invalidated by the court of appeals, there has been a drastic change in position by the Secretary.6/

6/ Undoubtedly there is still a substantial justiciable controversy between the parties because, for example, there are several important matters still unresolved by the Secretary's new procedures. In these new Claims Manual procedures the Secretary certainly has not provided for the opportunity for an oral evidentiary hearing as required by the court of appeal's decision. In lieu of following that decision, the Secretary has merely set a limit on the amount to be recouped during
(Cont'd on next page)

Whereas before the court of appeals the Secretary argued, inter alia, that his current recoupment procedures were valid even though it was his practice to suspend indefinitely respondents' entire monthly check, now, because of these new procedures, he contends there is no deprivation, only a temporary, limited reduction of the recipient's property interest.7/ By this maneuver, the Secretary is attempting to have this Court validate a system which he concedes may be substantially different from the one before the lower courts. This he cannot do for it is the settled law of this Court that it will not be misled into issuing advisory opinions. EPA v. Brown, 431 U.S. 99, 103-104 (1977); Fusari v. Steinberg, 419 U.S. 388 (1975); Richardson v. Wright, 405 U.S. 208 (1972).8/

6/ (Cont'd)
any one month period. Additionally, by issuing these new procedures which do set such a limit, the Secretary has clearly acknowledged the importance of the recipient's interest in receipt of that monthly amount.

7/ It is noteworthy that the Claims Manual sections unveiled by the Secretary in his Opening Brief are changes to the same Claims Manual sections which are attached to the Petition for a Writ of Certiorari. Compare Pet. App. pp. 141a-142a with pp. 4a-13a of the Opening Brief.

8/ In EPA v. Brown, this Court stated that:

> We decline the Government's invitation to pass upon the EPA regulations when the only ones before us are admitted to be in need for certain modifications. Such action on our part would amount to rendering of an advisory opinion. For this Court to review regulations normally required to be reviewed by the Court of Appeals, before such review is had, is extraordinary. (Citations omitted.) 431 U.S. 99, 103-104.

In addition to unveiling these new procedures, the Secretary in his brief conveniently discloses numerous facts and statistics which were also never presented to any of the lower courts and are therefore not properly part of the record of this case. See, e.g., pp. 45, 46, 47, 49, and 50 of the Op. Br. In his brief, the Secretary discusses these facts and figures at great length in an effort to show that under Eldridge v. Matthews, supra, there is no need to provide pre-recoupment oral hearings and that such hearings involve a significant governmental burden. In fact these new matters are central to the Secretary's current claims that the court of appeals decision is wrong and inconsistent with this Court's ruling in Eldridge v. Matthews, supra. This tactic is highly prejudicial to respondents and places them in an intolerable position in that respondents have never had any opportunity to investigate the authenticity or veracity of these facts and statistics so heavily relied on by the Secretary. Moreover, respondents will never have such an opportunity unless this Court acts now because the Secretary in his brief conveniently fails to either provide the actual documents containing these new facts or citations to the sources of these new facts and statistics. Either these facts and statistics are important to the disposition of this case and respondents should be permitted a fair opportunity to probe their authenticity and veractiy or they are irrelevant and should be stricken by this Court.

In any event, the Secretary has wrongly attempted to supplement the record of this case in this Court with

numerous new and untested, unsubstantiated facts and statistics.[9/]

III.

CONCLUSION

In view of the foregoing, the writ of certiorari should be dismissed or, at a minimum, this case should be remanded to the respective district courts for the initial determination of the effect, if any, of this new procedure and factual matter on their previous judgments. Of course, in remanding this case, in light of the Secretary's conduct herein the injunctions issued by the lower courts should remain in full force and effect until, and unless, they are vacated by those lower courts.

DATED: Honolulu, Hawaii, January 4, 1979.

STANLEY E. LEVIN
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9/ The compelling need for the respondents to probe these new factual representations is illustrated by the fact that in his efforts to obtain a stay of the Buffington district injunction, the Secretary represented to this Court that this injunction would cost the government between 15 and 40 million dollars. In his brief, the Secretary now claims that there are $100,000 in what he terms "direct" costs and at least $850,000 in "indirect" costs. Op. Br. at 49-50. The variance of these claims is astounding and it highlights the necessity for the Secretary to be required like any other litigant to prove his claims by a preponderance of the evidence before a court rather than being allowed on appeal to disclose "facts" in the face of a certified record. Such an effort must be condemned. See Adickes v. Kress & Co., 398 U.S. 144, 157-158, n. 16. (1970); Hopt. v. Utah, 144 U.S. 488, 491-492 (1885); Russell v. Southard, 53 U.S. (12 How.) 139, 158-159 (1851).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused to be duly MAILED, postage prepaid, two (2) copies of the foregoing document to:

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ROBERT GREENSPAN
Civil Appellate Division
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Washington, D.C. 20530

this 4th day of January, 1979.

DATED: Honolulu, Hawaii, January 4, 1979.

STANLEY E. LEVIN

Supreme Court, U. S.
FILED
DEC 4 1978
MICHAEL RODAK, JR., CLERK

No. 77-1511

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

EVELYN ELLIOTT, ET AL.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

FANNIE BUFFINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals on remand (Pet. App. 1A-35A) is reported at 564 F.2d 1219.

The initial opinion of the court of appeals (Pet. App. 40A-84A) is not reported. The opinion of the district court in *Elliott* (Pet. App. 89A-118A) is reported at 371 F. Supp. 960. The district court in *Buffington* did not write an opinion.

JURISDICTION

The judgments of the court of appeals (Pet. App. 38A-39A) were entered on July 1, 1977. A petition for rehearing was denied on December 15, 1977 (Pet. App. 36A-37A). On March 7, 1978, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including April 14, 1978. On April 5, 1978, Mr. Justice Rehnquist further extended the time to and including April 21, 1978. The petition was filed on that date and granted on October 2, 1978. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Due Process Clause requires that an oral hearing be held before rather than after a Social Security beneficiary's monthly payments are reduced in order to recoup an erroneous overpayment.

2. Whether a nationwide class action, on behalf of persons who have not met the jurisdictional requirements of Section 205(g) of the Social Security Act, may be maintained to challenge the procedures used to process Social Security cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. The Fifth Amendment of the Constitution provides in pertinent part:

> No person shall be * * * deprived of * * * property, without due process of law * * *.

2. Section 204 of the Social Security Act, 42 U.S.C. 404, and the regulations of the Department of Health, Education, and Welfare, are set forth in pertinent part at Pet. App. 119A-156A.

STATEMENT

Respondents in these consolidated cases receive benefits under the Social Security old-age, survivors', and disability insurance program.[1] The Secretary of Health, Education, and Welfare determined that they had received overpayments and sought to recoup the overpayments by reducing temporarily their monthly benefits. Respondents instituted these class actions in the United States District Courts for the District of Hawaii (*Elliott*) and the Western District of Washington (*Buffington*) to compel the Secretary to afford them an opportunity for an oral hearing before, rather than after, the beginning of recoupment. The district courts held that, under the Due Process Clause of the Fifth Amendment, Social Security beneficiaries

[1] The Social Security Administration has informed us that respondent Elliott died in 1973. Accordingly, the name of another class representative should be substituted in the caption of this case.

are entitled to such pre-recovery hearings. The court of appeals affirmed with some modifications.

1. Section 204(a)(1) of the Social Security Act, 42 U.S.C. 404(a)(1), provides that in the event of an erroneous overpayment to a Social Security beneficiary, "proper adjustment or recovery shall be made, under regulations prescribed by the Secretary [of Health, Education, and Welfare], * * * [by] decreas-[ing] any payment under this subchapter [relating to old-age, survivors', and disability insurance] to which such overpaid person is entitled * * *." Section 204(b) of the Act further provides, however, that "there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."

Once the Secretary initially has determined that an overpayment has been made, the recipient is notified of the determination. He is told the amount of the alleged overpayment and how and when it occurred. He is informed of his right to contest the determination by seeking reconsideration. He is also informed of his right to request that the Secretary waive recovery, in accordance with Section 204(b).[2] The no-

[2] The Social Security Claims Manual (Pet. App. 127A-135A) instructs district offices concerning the appropriate handling of beneficiaries' inquiries that are prompted by receipt of an overpayment notice. Section 5503.2 provides that "[w]hen feasible, the response to an overpayment notice should be handled by means of personal contact" (*id.* at 128A). Personal contact permits the local SSA representative "to make inquiry on pertinent issues, give explanation as appropriate, and observe the reactions of the overpaid person for evaluation purposes" (*ibid.*). Section 5503.3 directs district office employees to explain the reasons for an overpayment and to obtain from the SSA reviewing office any information necessary to explain the overpayment or to help the beneficiary decide whether to seek reconsideration or waiver. Section 5503.4 requires district offices to inform beneficiaries that waiver of recovery may be available even if a reconsideration request is denied. In addition, the Manual provides that beneficiaries should be assisted in completing the forms required for reconsideration or waiver and that district offices should make certain the forms include the specific reasons for the beneficiary's request.

tice ordinarily proposes recovery of the overpayment through a temporary interruption of monthly benefits, to begin no earlier than 30 days after the date of the notice. Social Security Claims Manual § 5503.1 (Pet. App. 126A). At the same time, however, the notice informs the recipient that, in the great majority of cases, less onerous "partial adjustments" of monthly payments are available.[3] Finally, the notice invites

[3] Under new Claims Manual provisions (App., *infra*) that will go into effect in January 1979, the Social Security Administration will not propose a complete interruption of monthly benefits unless an overpayment was caused by a beneficiary's "intentional false statement or representation or willful concealment of, or deliberate failure to furnish, material information." The Administration ordinarily will propose a 25% reduction in monthly benefits in order to effect recovery in non-fraud cases. Smaller reductions will continue to be permitted on request in most cases under the new version of Claims Manual § 5515.4. Moreover, a recent change in the Secretary's regulations has added greater flexibility to the partial adjustment system; the Social Security Administration now is free to allow even smaller monthly reductions than were previously available. See 43 Fed. Reg. 31317 (1978) (to be codified at 20 C.F.R. 404.502(c)); see also pages 31-33 *infra*.

the beneficiary to discuss his case with the local Social Security office. See 20 C.F.R. 404.907-404.913 (Pet. App. 150A-153A); Claims Manual § 5503 (Pet. App. 125A-126A). Social Security district offices have been instructed to provide explanation and assistance to recipients who inquire about overpayment notices and the procedures for obtaining reconsideration or waiver. Claims Manual §§ 5503.2(b) and 5503.3 (Pet. App. 129A-131A).

If the recipient requests waiver of recovery or reconsideration of the determination that there has been an overpayment, recoupment is deferred pending the Secretary's administrative review (Pet. App. 126A, 130A, 134A, 139A).[4] If the Secretary decides that there was indeed an overpayment and that waiver is not warranted, the beneficiary's subsequent monthly benefit payments are reduced until the overpayment has been recouped (*id.* at 155A). The beneficiary is informed of the reasons for the Secretary's decision and of the availability of further administrative review, including a full evidentiary hearing. 20 C.F.R. 404.915, 404.917 (Pet. App. 154A-155A). If, after such a hearing, the Secretary determines that there has been no overpayment, or that the beneficiary is entitled to waiver of recovery, the beneficiary's withheld payments are repaid, and subsequent payments are restored to the appropriate level.

2. The class representatives in *Buffington*, Fannie Buffington and Frances Biner, receive Social Secur-

[4] There is one minor exception to this rule. See Pet. 4 n.1; Social Security Claims Manual § 5503.1 (Pet. App. 127A).

ity old-age benefits. On the basis of annual reports of excess earnings filed by respondents themselves, the Secretary determined that they had received overpayments.[5]

The amount of Buffington's overpayment was $78.60. She was notified of the overpayment on October 3, 1973, and the $78.60 was withheld from her November 1973 check.[6] She then requested reconsideration by the Secretary,[7] who sustained the determination that there had been an overpayment (Pet. App. 8A). On October 22, 1974, the district court ordered the Secretary to restore to Buffington the amount re-

[5] Under 42 U.S.C. 403(h), Social Security beneficiaries are required to file such reports whenever their earnings exceed a statutory maximum (see 42 U.S.C. 403(f)). Section 203(b) of the Social Security Act, 42 U.S.C. 403(b), requires the Secretary to deduct the amount of excess earnings from monthly Social Security benefits.

[6] Under the Social Security Claims Manual provisions effective in October 1973, the Secretary did not observe a 30-day waiting period before the beginning of recoupment, where his original overpayment determination was based on an annual earnings report filed by the beneficiary. In such cases, recoupment began immediately with the first monthly payment to come due after the beneficiary had been notified of the overpayment. Even in such cases, however, the beneficiary's subsequent request for waiver or reconsideration deferred further recoupment until the initial administrative review had been completed. Since January 1, 1974, the Secretary has provided at least 30 days' notice of recoupment, even where overpayment determinations have been based on the beneficiary's own excess earnings report. See Pet. App. 4A n.3, 44A n.2.

[7] Buffington apparently did not file a formal request for waiver.

couped from her until she was given the opportunity for a hearing (A. 264). The Secretary restored the $78.60 and in November 1975 notified Buffington of her right to a pre-recoupment oral hearing. Buffington did not request such a hearing, but asked instead that the Secretary reduce her monthly benefits by $50 in order to recover the $78.60 overpayment and other uncontested overpayments that she and her husband had received. The Secretary granted this request and recoupment was completed in December 1977.

Biner's overpayment was $2,233.60, the total amount of benefits she received during 1972. After the Secretary initially concluded that she had been overpaid, Biner twice requested reconsideration of that finding; she also requested that recoupment be waived.[8] After considering Biner's submissions, the Secretary adhered to his decision that recovery of the overpayment was appropriate (Pet. App. 50A-51A).[9]

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[8] Because of an administrative error in Biner's case, these requests did not postpone recoupment pending completion of the Secretary's initial review, as they should have done under Claims Manual § 5503(c) (now § 5503.2(b) (Pet. App. 130A)).

[9] Although Biner qualified for Social Security benefits in November 1970, she did not receive benefits for 1970 or 1971, because her earnings in each of those years were approximately $6,500. In 1972, however, Biner notified the local Social Security office that she intended to stop working and therefore would not have earnings in excess of the statutory maximum that could be earned without affecting Social Security benefits. Accordingly, she received full benefits for 1972. She also continued to work and earned more than $7,000 during that year. Her employer reported these earnings to the Social Security Administration, and the Secretary then requested Biner to file an excess earnings report for 1972. The report led directly to the Secretary's overpayment determination. On the basis of these facts, the Secretary concluded that Biner was not without fault in receiving the overpayment; he therefore refused to waive recoupment (affidavit of James E. Forbus, Deputy Director, Bureau of Retirement and Survivors' Insurance, Social Security Administration; Pet. App. 8A-10A).

He agreed to recoup the overpayment by deducting $50 per month from Biner's future Social Security benefits (*id.* at 50A). After the institution of this suit, Biner received an oral hearing before an administrative law judge, who sustained the Secretary's decision (*id.* at 51A). Because Biner has received an oral hearing on her reconsideration and waiver requests, the recouped sum has not been restored to her pending the outcome of this litigation.

Buffington and Biner argued that the Secretary's procedures for recovering overpayments fail to provide due process of law because they do not afford claimants a pre-recoupment oral hearing. The district court determined that it had jurisdiction under 28 U.S.C. 1361 and certified the suit as a nationwide class action, defining the class as all persons eligible for old-age and survivors' insurance benefits whose benefits have been or will be reduced or otherwise adjusted without notice and opportunity for a prior hearing (Pet. App. 54A; district court order of April 4, 1974).[10] The district court declared the Secretary's

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[10] The class order was later modified to exclude groups or beneficiaries whose claim to a prior hearing was the subject of litigation in other courts (Pet. App. 54A; district court order of October 29, 1974). See page 15 and note 18, *infra*.

recoupment procedures unconstitutional and enjoined the Secretary from recovering any overpayment from members of the class without affording them an opportunity for a pre-recoupment hearing (Pet. App. 42A).

3. The class representatives in *Elliott* receive either Social Security old-age insurance benefits or Social Security disability insurance benefits.[11] Overpayment determinations with respect to three of the representatives, Isabelle Ortiz, Jordan Silva, and John Vaquilar, were based on annual reports of excess earnings filed by the recipients (Pet. App. 93A-94A).[12] Respondents Evelyn Elliott, Raymond Gaines, and Nancy Yamasaki were overpaid because of administrative errors.

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[11] Under Section 202(k)(4) of the Social Security Act, 42 U.S.C. 402(k)(4), a person may not receive both old-age and disability insurance benefits for the same month.

[12] The overpayment to Ortiz was $492.80, all of which was recouped by September 1972 (May 2, 1973, affidavit of James Forbus). The total overpayments to Silva between 1968 and 1971 were approximately $3,300. Approximately $1,300 of this sum was recouped by May 1973, and further recoupment was deferred pending the disposition of this case in the district court (*ibid.*; Pet. App. 96A). The total overpayments to Vaquilar for 1967, 1968, and 1971 were approximately $2,000. Approximately $900 of this sum, the overpayment for 1971, remained outstanding in February 1973. The Social Security Administration agreed to recoup the overpayment through a temporary reduction of $40 in Vaquilar's monthly benefits (May 2, 1973, affidavit of James E. Forbus), and recoupment proceeded in this way until the district court's decision.

For seven months Elliott received both old-age and disability benefits, even though she was entitled only to one or the other (December 12, 1972, affidavit of Bernard Popick).[13] Gaines, a recipient of disability benefits, received duplicate checks for three months, apparently because he changed his address (May 2, 1973, affidavit of James E. Forbus).[14] Yamasaki, a recipient of dependent's disability benefits, received excessive payments for seven months because the Social Security Administration failed to reduce her monthly benefit level to take account of workers' compensation benefits received by her husband (*ibid.*).[15]

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[13] The overpayment to Elliott was $1,092.70. She requested that the sum be recovered through a temporary reduction of $50 in her monthly disability benefits. The Social Security Administration complied and recovered $200 by the time this suit was filed in August 1972. By agreement between the parties, the $200 was returned to Elliott pending final disposition of this litigation (December 12, 1972, affidavit of Bernard Popick).

[14] The overpayment to Gaines was $376.20. It occurred after the beginning of this lawsuit, and recoupment has been deferred pending the outcome of the case (Pet. App. 97A; May 2, 1973, affidavit of Bernard Popick).

[15] Yamasaki initially was informed that she had received an overpayment of $207.90. The Social Security Administration later learned that her husband's workers' compensation benefits had ceased four months earlier than SSA previously believed. The increased payments owed to Yamasaki, her husband, and her child as a result of this information more than cancelled the overpayment she received during the three-month period when her husband was receiving workers' compensation and her benefits were not properly adjusted. The Secretary therefore recouped the overpayment by deducting it from the amount of back Social Security benefits paid to the Yamasakis (May 2, 1973, affidavit of Bernard Popick).

Two weeks before this suit was filed, and approximately four and a half months after she received notice of the Secretary's overpayment determination, Elliott requested reconsideration and waiver. None of the other class representatives sought administrative review before the beginning of this action in August 1972. The district court found that Vaquilar, Gaines, and Yamasaki submitted the necessary request forms several months later, on the advice of counsel (Pet. App. 95A-96A & n.8, 97A & n.14).[16] After considering Vaquilar's written submissions, the Secretary concluded that the earlier overpayment determination was correct and that waiver could not be granted because Vaquilar was at fault in failing to file accurate annual reports of excess earnings (May 2, 1973, affidavit of James E. Forbus). During the pendency of this suit, the Secretary has not conducted any other administrative review proceedings concerning the overpayments received by the named respondents.

Like its *Buffington* counterpart, the complaint in *Elliott* charged that the Secretary's failure to provide an oral hearing before beginning recoupment of So-

[16] According to the Social Security Administration, Silva's claims folder indicates that he too filed a request for reconsideration and waiver after this litigation began. The Secretary reaffirmed his overpayment determination and denied the request for waiver in August 1977. There is no record that Ortiz ever filed such a request. Our petition erroneously stated that "[a]ll of the respondents sought reconsideration and waiver from the Secretary but initiated this suit before the Secretary could act on their requests" (Pet. 7).

cial Security overpayments denies beneficiaries due process of law. The district court permitted the suit to proceed as a class action on behalf of all Social Security old-age and disability insurance beneficiaries in Hawaii, who are being or will be subjected to adjustment of their benefits "without adequate prior notice of the ground for such action and without a prior hearing on disputed issues relating to such actions" (order of October 17, 1972). The court found jurisdiction under 28 U.S.C. 1361 and declared the Secretary's recoupment procedures unconstitutional (Pet. App. 112A).

The court stated that "most social security recipients depend upon their full benefits for the necessities of life," and that therefore "the adverse impact of an erroneous suspension or reduction * * * is great" (*id.* at 106A-107A; footnotes omitted). The court also found that the government has a substantial interest in the uninterrupted provision of Social Security benefits to those persons entitled to receive them (*id.* at 108A). Relying on *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), the court concluded that the additional administrative and fiscal burden imposed by a pre-recoupment oral hearing requirement "cannot outweigh the arguments in favor of such hearings" (Pet. App. 109A). Accordingly, the court enjoined the Secretary from "reducing, terminating, or suspending" Social Security old-age and disability insurance benefits to recipients living in Hawaii, without first affording those recipients an opportunity for an oral hearing (*id.* at 117A). The court also ordered the Sec-

retary to restore to the named respondents "any and all money withheld since June 22, 1972, without a prior hearing" (*ibid.*).

4. The court of appeals affirmed the holdings of the district courts with regard to jurisdiction and the propriety of class relief (Pet. App. 51A-63A). The court further affirmed the holdings that the Secretary's recoupment procedures are unconstitutional, but it remanded the cases to the district courts for the entry of more limited orders that would require a prior oral hearing only where the Secretary's determination might turn on the credibility of witnesses (*id.* at 63A-84A).[17] In explaining this result (*id.* at 68A-82A), the court adopted the reasoning of the Third Circuit in *Mattern* v. *Weinberger*, 519 F.2d 150 (1975), a case raising identical issues. The court specified (Pet. App. 83A) that Social Security beneficiaries have a right to be represented by counsel at pre-recoupment oral hearings and that such hearings should afford claimants an opportunity to present testimonial and documentary evidence and to cross-examine adverse witnesses. The court also required that the hearings be conducted by an independent hearing officer having no connection with the initial overpayment determination. The court directed that the hearing officer render his decision in writing and set forth his reasoning and the evidence on which he relied in an opinion to be furnished to the beneficiary.

[17] The court distinguished between two categories of overpayment disputes, "reconsideration" cases and "waiver" cases. "Reconsideration" cases involve the correctness of the Secretary's determination that an overpayment has occurred. In the court's view (Pet. App. 77A-79A), such disputes often can be decided on the basis of documentary evidence. By contrast, in "waiver" cases, issues of credibility ordinarily are involved in determining whether a claimant was at fault in receiving an overpayment (*id.* at 80A-81A). The court determined, however, that the constitutional necessity of a prior hearing turns on the particular facts of each case and not on whether the case is one of "reconsideration" or "waiver" (*id.* at 78A-79A, 81A-82A; see also *id.* at 23A-30A).

5. After the initial decision of the court of appeals, this Court held in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), that the Due Process Clause does not require an oral hearing prior to termination of Social Security disability insurance benefits. The Secretary then filed a petition for a writ of certiorari in these cases (No. 75-1234), challenging the decision of the court of appeals as inconsistent with the principles established in *Eldridge*. Even before this Court decided *Eldridge*, the Secretary had filed a petition (No. 75-649) for review of the Third Circuit's ruling in *Mattern*. The Court granted both petitions, vacated the judgments of the court of appeals, and remanded for further consideration in light of *Eldridge*. 425 U.S. 987 (1976). On remand the court of appeals adhered to the essential features of its earlier decision (Pet. App. 1A-35A).[18]

[18] The Third Circuit remanded *Mattern* to the district court, and in March 1977 that court held that the due process issue resolved in *Eldridge* is not materially distinguishable from the similar issue presented by the Secretary's recoupment procedures. Accordingly, the district court granted summary judgment for the Secretary. 427 F. Supp. 1318 (E.D. Pa.). The court of appeals reversed and adhered to the result

The court stated that Social Security old-age and survivors' insurance benefits are "partially need-based," but it acknowledged that "victims of erroneous recoupment generally can resort to welfare if in financial need" (Pet. App. 23A & nn.20, 21). The court therefore found that the strength of respondents' interest in the uninterrupted receipt of benefits pending final administrative review "lies somewhere between *Eldridge* and *Goldberg*" (*id.* at 22A-23A). The court concluded, however, that this interest, "[s]tanding alone, * * * falls short of compelling an oral pre-recoupment hearing" (*id.* at 23A).

The court distinguished *Eldridge* on two additional grounds. First, the court declared that, unlike the medical disability inquiry in *Eldridge*, waiver determinations (particularly those involving recipients' fault in inducing or retaining overpayments or recipients' detrimental reliance on incorrectly paid funds) frequently turn on issues of credibility and thereby entail a greater risk of erroneous deprivations if an evidentiary hearing is not provided before recoupment (Pet. App. 24A-30A). In the court's view, the issues relevant to a waiver decision are not as readily susceptible to documentary resolution as those relevant to a decision on the termination of disability benefits.[19]

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reached in its earlier opinion. 582 F.2d 248 (3d Cir. 1978). The Secretary has petitioned for a writ of certiorari to review this decision (No. 78-699).

[19] The court reiterated its view that, although requests to reconsider the finding of an overpayment generally would not require a prior oral hearing, reconsideration cases "may arise in which the credibility of the claimant may be determinative of the outcome," and in such cases a pre-recoupment hearing should be provided (Pet. App. 3A, 24A). To avoid the administrative difficulties created by the court's decision that the requirement of a hearing turns on the facts of each case, the Secretary has offered a pre-recoupment hearing to all class members notified of an initial overpayment determination.

Second, the court thought that the administrative burdens associated with requiring an oral hearing prior to recoupment are substantially less onerous than the corresponding burdens that would be imposed by a similar procedural requirement as a precondition to termination of disability benefits. The court predicted that Social Security beneficiaries would request pre-recoupment evidentiary hearings in only a small percentage of overpayment cases, and it stated that, in contrast to the termination situation, benefits paid during the course of additional pre-recoupment review almost always would go to persons entitled to receive them (Pet. App. 30A-33A).

The court of appeals also adhered to its previous ruling with respect to the jurisdictional issues raised by the Secretary. The court sustained the district courts' exercise of jurisdiction under 28 U.S.C. 1361 to grant injunctive and class relief that the court of appeals recognized might not be available under Section 205(g) of the Social Security Act, 42 U.S.C. 405 (g) (Pet. App. 10A & n.10). The court held that the Due Process Clause imposes on the Secretary a "*duty*" to provide certain minimum notice and hearing opportunities to Social Security recipients subject to recoupment and that mandamus lies to ensure performance of that duty (Pet. App. 11A).

In response to the Secretary's argument that Section 205(g) provides the exclusive avenue for judicial review of claims under the Act, the court stated that respondents' suits were brought to assert a constitutional due process right, not "to recover on any claim" for benefits. Accordingly, the court ruled that the actions are not covered by the jurisdictional limitations contained in Section 205(h) of the Act, 42 U.S.C. 405(h) (Pet. App. 12A-14A & nn.12, 13). Moreover, the court said, because Congress did not extend mandamus jurisdiction to all federal courts until 1962, many years after the enactment of Section 205(h), the latter statute could not have been intended to preclude the exercise of Section 1361 jurisdiction in Social Security cases (*id.* at 14A-15A & n.14).

SUMMARY OF ARGUMENT

I

The Secretary's procedures governing the recovery of Social Security overpayments provide a fair and reliable method for determining whether an overpayment has been made and, if so, whether recovery should be waived. In requiring the Secretary to offer a pre-recoupment evidentiary hearing whenever a reconsideration or waiver request involves an issue of credibility, the court of appeals departed from the principles announced in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976). The additional administrative and social costs associated with pre-recoupment oral hearings significantly outweigh any social benefits that accrue from such a requirement.

The court of appeals acknowledged that, when a beneficiary asks the Secretary to reconsider his determination that an overpayment has occurred, the matter ordinarily can be resolved by reference to documentary evidence. When a beneficiary asks the Secretary to waive recovery of an overpayment, he by definition admits that he has received payments to which he is not entitled. In either case the Constitution does not bar the Secretary from proceeding with recoupment before conducting an evidentiary hearing. The Secretary provides such a hearing after recovery has begun, and if the beneficiary's contentions are sustained, he of course receives complete reimbursement of the monies previously withheld. This procedure, combined with the existing pre-recoupment safeguards against erroneous deprivations, satisfies the Due Process Clause.

Eldridge held that the Secretary may terminate Social Security disability insurance benefits without providing a pre-termination oral hearing. The Court stated that, as a general rule, "something less than an evidentiary hearing is sufficient prior to adverse administrative action" (424 U.S. at 343). The Court identified three factors that are relevant in determining whether the Due Process Clause requires a departure from this rule in particular circumstances. They are: (1) the private interest at stake; (2) the risk of incorrect administrative decisions under existing procedures; and (3) the government interest in

the proper administration of the substantive program involved and in the avoidance of unnecessary procedural delay and expense. We consider them in turn.

(1) The private interest in the uninterrupted receipt of benefits is less substantial here than in *Eldridge*. *Eldridge* involved the termination of all disability benefits; this case involves only the temporary reduction of benefits, usually by no more than 25%, followed by a resumption of full benefits once recovery of an overpayment is complete.

In the limited number of cases in which recoupment may cause financial strain, federal and state welfare benefits ordinarily are available to relieve any hardship. By contrast, when Social Security disability insurance benefits are terminated because of a finding that disability has ceased, as in *Eldridge*, federal welfare benefits, at least, are not normally available.

Although Social Security old-age and survivors' insurance benefits are reduced when a recipient's earnings exceed a statutorily specified level, eligibility for these benefits is not dependent on need. This case is therefore unlike *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), in at least two ways. Recoupment normally does not require a complete suspension of benefits and, in any event, recovery of an overpayment does not "deprive an *eligible* recipient of the very means by which to live while he waits" (397 U.S. at 264) for a post-deprivation oral hearing.

(2) The risk of an erroneous deprivation under the Secretary's existing recoupment procedures is

very small. The court of appeals recognized that this is true when beneficiaries request reconsideration of the determination that an overpayment has occurred, and it is no less true when beneficiaries request waiver of recovery. The court of appeals, however, asserted that waiver decisions frequently depend on an evaluation of the claimant's credibility and that therefore decisions based on written submissions are unreliable.

The court may well have overestimated the extent to which the Secretary's waiver decisions turn on credibility. The Secretary's regulations establish an objective standard for determining whether beneficiaries were at fault in receiving or retaining an overpayment. The beneficiary's subjective good faith is not critical.

More important, the validity of the court of appeals' conclusion is undermined by the demonstrable reliability of the Secretary's existing procedures. In the first 22 months of experience with the hearings ordered by the court of appeals, only approximately 1.6% of those denied waiver after their written submissions have been granted waiver after a pre-recoupment oral hearing. Viewed as a percentage of the total number of overpaid Social Security old-age and survivors' insurance beneficiaries, the number of persons who have obtained waiver after a pre-recoupment oral hearing is a negligible 0.03%. The Court stated in *Eldridge* that "the overall rate of error for all denials of benefits" must be considered in testing the fairness of a given set of procedures (424 U.S.

at 346 n.29). By this criterion, the Secretary's recoupment procedures are highly efficient and involve only a trivial risk of error.

(3) The Secretary has a substantial interest in averting the imposition of additional and unnecessary procedural requirements for the recovery of Social Security overpayments. The Secretary has a fiduciary responsibility to all participants in the Social Security insurance programs to protect trust fund monies. Whenever recovery of overpayments is delayed, the trust fund is diminished, and beneficiaries and potential beneficiaries who have not received overpayments suffer. Commitment of the Secretary's scarce resources to the pre-recoupment oral hearings required by the court of appeals inevitably reduces the money and manpower available to administer other aspects of the Social Security programs.

Moreover, the court of appeals' decision creates a real danger that additional procedural protections will be deemed mandatory in other federal programs. Pending litigation in the District of Columbia and the Ninth Circuit confirms this fear. In short, although the full cost of pre-recoupment hearings cannot be calculated precisely, this Court's observation in *Eldridge* (424 U.S. at 347) is equally valid here: "[T]he ultimate additional cost in terms of money and administrative burden would not be insubstantial."

II

A. *Weinberger* v. *Salfi*, 422 U.S. 749, 757 (1975), held that Section 205(g) of the Social Security Act,

42 U.S.C. 405(g), provides the sole source of jurisdiction for judicial review of claims arising under Title II of the Act. Accordingly, the district courts did not have jurisdiction over these suits under 28 U.S.C. 1361.

Under the principles announced in *Eldridge*, the district courts could exercise their jurisdiction under Section 205(g) to adjudicate the claims of the class representatives in these cases. Section 205(g) provides jurisdiction to review "any final decision of the Secretary made after a hearing to which [the person seeking review] was a party * * *." *Eldridge* held that, where the issue presented is "entirely collateral" to any substantive claim of entitlement to benefits, the "final decision" requirement of Section 205(g) does not necessitate exhaustion of all available opportunities for administrative review. Like the due process claim in *Eldridge*, respondents' due process contention is collateral to their claim for benefits and, accordingly, their failure to pursue an administrative appeal did not deprive the district courts of jurisdiction under Section 205(g).

Jurisdiction under 28 U.S.C. 1361, however, was not available. Section 205(h) of the Social Security Act, 42 U.S.C. 405(h), states that the Act itself provides the sole source of jurisdiction for judicial review of Social Security old-age, survivors', and disability insurance claims. Notwithstanding the court of appeals' contrary belief, this rule applies even where a claimant raises a constitutional challenge to

a decision by the Secretary. See *Weinberger* v. *Salfi*, *supra*; *Mathews* v. *Eldridge*, *supra*.

Likewise, the court of appeals erred in concluding that, because Section 1361 was enacted after Section 205(h), the latter statute could not have been intended to preclude Section 1361 jurisdiction over actions to recover on claims arising under Title II of the Social Security Act. Section 205(h)'s reference to 28 U.S.C. 41, as that provision stood when Section 205(h) was enacted in 1939, reflects a congressional purpose to bar jurisdiction under all general jurisdictional grants and to limit review of Title II claims to that provided in the Act itself. Just as Congress' failure to amend Section 205(h) to conform to the 1948 recodification of Title 28 did not affect the Court's decision on the availability of federal-question jurisdiction in *Salfi*, so the failure to amend Section 205(h) in 1962 to include a specific preclusion of Section 1361 jurisdiction does not support the availability of such jurisdiction here.

Furthermore, even apart from Section 205(h), these are inappropriate cases for the exercise of jurisdiction "in the nature of mandamus" under Section 1361. Mandamus jurisdiction is available only when there is no adequate legal remedy by which to vindicate a disputed right. Section 205(g) provides such a remedy for Social Security Act claimants and, accordingly, the district courts had no occasion to invoke Section 1361.

B. Section 205(g) of the Social Security Act does not authorize class relief. The statute permits "[a]ny

individual" to sue in federal district court to obtain judicial review of "any final decision of the Secretary made after a hearing to which [the plaintiff] was a party." The district court in such cases is empowered only to affirm, modify, or reverse the Secretary's decision. Section 205(g) thus envisions only the adjudication of individual claims, not class actions. This is hardly surprising in light of the fact that the vast majority of administrative decisions subject to review under Section 205(g) turn on particular facts.

Even if some class actions are permissible under Section 205(g), all members of the class must satisfy the jurisdictional requirements imposed by that section. *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973). The classes certified in these cases include Social Security recipients whose benefits "have been or will be" reduced under the Secretary's recoupment procedures without the opportunity for a prior hearing. The classes thus include many persons who have not requested reconsideration or waiver and who therefore do not satisfy Section 205(g)'s "nonwaivable" requirement that a claim be filed with the Secretary before judicial review of the Secretary's "final decision" is sought. See *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 328-330. Indeed, the classes include many persons as to whom the Secretary has not even made an overpayment determination. The district courts erred in exercising jurisdiction over persons who have not fulfilled the conditions prescribed by Section 205(g).

The district courts also erred in granting injunctive relief. Section 205(g) authorizes a reviewing court only "to enter * * * a judgment affirming, modifying, or reversing the decision of the Secretary * * *." The statute says nothing about enjoining the operation of a federal statute or directing that a statute be implemented through specific procedures other than those established by the Secretary. *Weinberger* v. *Salfi, supra*, 422 U.S. at 763 n.8. An injunction is an equitable remedy and therefore is available only when there is no adequate remedy at law. Section 205(g) provides an adequate legal remedy for Social Security claims and does not contemplate equitable relief. As this Court held in *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297, 301 (1943), when Congress "select[s] the precise machinery" for the protection of an entitlement it has created, courts should not assume that other avenues of recourse also are open. "In such a case the specification of one remedy normally excludes another." *Ibid.*

Finally, even if in some circumstances injunctive class relief is available under Section 205(g), the *Buffington* court acted imprudently in certifying a nationwide class and entering a nationwide injunction. This procedure unnecessarily limits the opportunities for judicial consideration of difficult legal questions. It also may force this Court to undertake premature review of a problem without the benefit of the views of more than one lower court. The *Buffington* order thus violates equity's salutary rule that

injunctions should be used with restraint and should afford relief only to the parties properly before the court.

ARGUMENT

I

THE SECRETARY'S RECOUPMENT PROCEDURES DO NOT VIOLATE THE DUE PROCESS CLAUSE

A. Introduction

Under the procedures challenged by respondents, the Social Security beneficiary is notified by mail when the Secretary determines that he has received an overpayment.[20] He is told the amount of the overpayment and the way in which it occurred. He is also advised of his right to request reconsideration or waiver. The beneficiary thus knows the basis for the Secretary's proposed action before it is taken, and he may present objections to that action in advance. Although these objections must be submitted in writing, the beneficiary can discuss his case with Social Security officials at the district office nearest his home. These officials are responsible for assisting the beneficiary in providing all the information necessary to evaluate his case. The beneficiary may supply whatever documentation he wishes in support of his position, and printed forms are made available to facilitate the presentation of his reconsideration or waiver request.

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[20] These procedures are described more fully at pages 4-6, *supra*.

If the beneficiary requests reconsideration or waiver within 30 days, the Secretary defers recoupment until he has acted on the request.[21] Only after the Secretary has reviewed the beneficiary's case, and has adhered to his initial determination that recoupment is appropriate, does the process of recovering the overpayment begin. As soon as the beneficiary is advised of the Secretary's determination, he may request a full evidentiary hearing with respect to his claim. If the Secretary's decision is reversed after that hearing, the beneficiary receives full restitution.

In *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the Court reviewed the procedures used by the Secretary in terminating Social Security disability insurance benefits to persons no longer entitled to receive them. The Secretary did not offer an oral hearing before the initial suspension of disability benefits, but the Court declared the Secretary's procedures constitutionally acceptable. The Court explained that it had not found adequate reason "to depart from the ordi-

[21] Any objection at all within the 30-day period is sufficient to postpone recoupment. Even if the beneficiary does not request reconsideration or waiver within that period, a reconsideration request made within 60 days, or a waiver request, whenever made, will result in a resumption of full benefits until the request has been acted on (Pet. App. 126A, 130A, 139A). Moreover, if the Secretary finds that there was good cause for the filing of a waiver or reconsideration request more than 30 days after the beneficiary's receipt of the initial overpayment notice, any amount already recouped by the time of the request will be restored to the beneficiary pending the Secretary's disposition of the waiver or reconsideration application (*id.* at 139A).

nary principle * * * that something less than an evidentiary hearing is sufficient prior to adverse administrative action" (424 U.S. at 343).

Here, as in *Eldridge*, procedures short of an evidentiary hearing offer the beneficiary ample protection against erroneous interim deprivations. The court of appeals' decision to the contrary appears to rest on the assumption that *Eldridge* involved a borderline situation in which the Secretary's decision not to provide a pre-suspension oral hearing narrowly survived due process scrutiny. The court of appeals apparently thought that if the present case involves any circumstance, not found in *Eldridge*, that supports the utility or desirability of pre-recoupment oral hearings, then such hearings are constitutionally compelled. *Eldridge* does not sustain such a position.

Eldridge made it clear that due process generally does not require an oral hearing prior to adverse administrative action. The Court restated this rule with approval in *Dixon* v. *Love*, 431 U.S. 105, 113 (1977). See also *Arnett* v. *Kennedy*, 416 U.S. 134, 187 (1974) (White, J., concurring in part and dissenting in part), and cases there cited. Pre-deprivation oral hearings may be required in certain exceptional cases, because, as this Court has observed, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union Local 473* v. *McElroy*, 367 U.S. 886, 895 (1961). See also *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); *Joint Anti-Fascist Refugee*

Committee v. *McGrath*, 341 U.S. 123, 162-163 (1951) (Frankfurter, J., concurring). The Court in *Cafeteria Workers* suggested that the content of due process in a given set of circumstances depends on "the precise nature of the government function involved as well as of the private interest that has been affected by governmental action" (367 U.S. at 895). Using similar language 15 years later, *Eldridge* identified three considerations that guide the Court in determining what process is due in a particular situation (424 U.S. at 335):

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

The Secretary's recoupment procedures accommodate the competing interests in a constitutionally permissible way.

B. The Private Interest in the Uninterrupted Receipt of Benefits Pending Final Administrative Action Is Less Substantial Here Than in *Eldridge*

1. *Eldridge* involved termination of all disability benefits; this case involves only the temporary reduction of otherwise continuing benefits in order to recover overpayments. Full benefits resume once re-

coupment is complete. Under prevailing regulations and Social Security Claims Manual provisions, beneficiaries may request that recovery be spread out to diminish the amount by which monthly payments are reduced. See 20 C.F.R. 404.502(c), as amended in 43 Fed. Reg. 31317 (1978);[22] Claims Manual §§ 5515, 5515.2, 5515.4 (Pet. App. 141A-145A). Such extensions of the recoupment period (called "partial adjustments") are routinely granted,[23] unless the overpayment was the result of fraud or unless "the beneficiary has income and resources sufficient to meet current ordinary expenses despite a loss of the full monthly benefits * * *." Claims Manual § 5515.2(a) (Pet. App. 142A).

Under the new Claims Manual provisions that will become effective in January 1979 (App., *infra*), recoupment generally will not require more than a 25% reduction in monthly benefits, unless the overpayment was obtained by fraud or the beneficiary still has the overpaid amount in his possession. In the absence of fraud or retention of the overpayment, the Social Security Administration will no longer propose temporary interruption of monthly benefits. Rather, it will suggest a 25% reduction in payments

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[22] The pertinent portions of Section 404.502(c), as they were before the July 1978 amendments, are reprinted at Pet. App. 146A-147A.

[23] Indeed, four of the named respondents, Buffington, Biner, Elliott, and Vaquilar, requested deferral of recoupment through partial adjustment of monthly benefits, and in all four instances the requests were granted.

and will automatically approve any reduction and recoupment schedule requested by the beneficiary, as long as the adjustment is at least $10 per month and will result in full recovery of the overpayment within 48 months (or by the date scheduled for termination of benefits, if there is such a date and it is less than 48 months from the beginning of recoupment).[24] If a plan proposed by a beneficiary does not meet these conditions, the district office will investigate the beneficiary's financial situation and will set an appropriate monthly recovery rate on the basis of the information thus obtained.

Where the beneficiary is not at fault in receiving an overpayment, but recoupment would not defeat the purpose of Title II of the Social Security Act, the district office will set a monthly recovery rate no higher than the amount by which the beneficiary's

[24] There is one exception to this rule. Before requesting a partial adjustment other than the proposed 25%, the beneficiary may apply for waiver. In connection with that application, he will be required to submit forms describing his financial circumstances. If waiver is denied, the information contained on these forms will govern the decision on a subsequent partial adjustment request. Where the details of a beneficiary's financial situation have been developed in the record, the Social Security Administration will reduce monthly insurance payments as much as possible without depriving the beneficiary of his ability to meet current expenses. Thus, depending on the personal resources and non-Social Security income revealed in the waiver application, the Administration may insist on a monthly recovery rate greater than that requested by the beneficiary and perhaps even greater than 25%.

income exceeds his expenses.[25] Where the beneficiary is at fault in receiving the overpayment, the district office will reduce monthly benefits by 25% or by the amount necessary to effect full recovery within 48 months, whichever is less.

The new Claims Manual provisions will liberalize previous practices in at least two ways: (1) recoupment through temporary suspension of a beneficiary's entire monthly payment will not even be proposed, except in cases of fraud or where overpaid funds actually remain in the beneficiary's possession; and (2) the period of time during which recoupment should be accomplished will be extended from 36 months to 48 months, thereby making it possible to grant more partial adjustments at rates below 25% of monthly benefits. As a consequence, even more than in the past the partial adjustment system ordinarily will permit monthly payments to be maintained at a level high enough to cover the recipient's current expenses.[26]

[25] If this amount is less than $10 per month, waiver will be granted and there will be no recoupment at all.

[26] Fraud cases aside, the only exceptions to this rule will be cases in which a beneficiary is at fault in receiving an overpayment and the partial adjustment necessary to allow him to meet current expenses results in a withholding so small that full recovery of the overpayment is not possible within 48 months or before the end of his entitlement to benefits. In such cases, the Secretary will withhold as much as 25% of monthly payments, even though this may reduce benefits below the level necessary to meet current expenses. Claims Manual § 5515.4(d)(3) (Pet. App. 145A).

2. Moreover, in the event that recovery of overpaid retirement or disability insurance benefits creates a situation of financial need, elderly or disabled recipients generally are eligible for Supplemental Security Income (SSI) welfare benefits under Title XVI of the Social Security Act, 42 U.S.C. 1381 *et seq.* By contrast, because the definition of disability for Social Security and SSI purposes is the same (compare 42 U.S.C. 423(d)(1)(A) and (d)(2)(A) with 42 U.S.C. 1382c(a)(3)(A) and (B)), a person whose disability insurance payments are terminated by virtue of a finding that his disability no longer exists, as in *Eldridge*, almost certainly would be ineligible for SSI disability benefits (424 U.S. at 342 n.27). For this reason as well, therefore, the private interest in avoiding improper recoupment of overpayments is not as great as the private interest in avoiding incorrect termination of disability benefits.

3. The court of appeals acknowledged that, "[s]tanding alone," the recipient's interest in avoiding an erroneous reduction in monthly Social Security insurance benefits "falls short of compelling an oral pre-recoupment hearing" (Pet. App. 23A). Nonetheless, the court concluded that the strength of recipients' interest in the uninterrupted receipt of benefits "lies somewhere between [the private interests at stake in] *Eldridge* and *Goldberg*" (*id.* at 22A-23A). Ignoring the fact that the respondent class in *Elliott* includes disability, as well as old-age, beneficiaries, the court of appeals attempted to dis-

tinguish *Eldridge* on the ground that the disability insurance program at issue there is not need-related, whereas the old-age and survivors' program is "partially need-based" (*id.* at 23A & n.20).[27] In support of this distinction, the court noted that old-age and survivors' "benefits are reduced by a large percentage of any income to the recipient above a very low exemption" (*id.* at 23A n.20).

This argument does not adequately distinguish disability benefits from old-age and survivors' benefits. Disability benefits, like old-age and survivors' benefits, are reduced by some forms of outside income, in particular by workers' compensation benefits. See 42 U.S.C. 424a; *Richardson* v. *Belcher*, 404 U.S. 78 (1971). The fact that the Social Security Act mandates such reductions does not mean that disability benefits are need-based. Indeed, this Court stated in *Eldridge* that "[e]ligibility for disability benefits * * * is not based upon financial need" (424 U.S. at 340). Likewise, eligibility for Social Security old-age and survivors' insurance benefits does not depend on need, although the amount of such benefits may be reduced if the recipient derives income from other sources. See *Mathews* v. *De Castro*, 429 U.S. 181, 185-186 & n.6 (1976).

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[27] At least with respect to recipients of disability benefits, the disposition of this case is squarely controlled by *Eldridge*. It would be odd if disability benefits could be terminated without a prior oral hearing, as *Eldridge* held, but could not temporarily be reduced without a prior oral hearing.

The court of appeals' effort to characterize the private interest in this case as more substantial than that in *Eldridge* is therefore unpersuasive. As the court itself admitted, "it is difficult to imagine that persons subject to a reduction in benefits under one program should have a greater interest than one subject to complete termination in a related program" (Pet. App. 23A n.20). The dominant characteristic of this case is not whether benefits are "partially need-based." It is, instead, that recoupment usually involves only a temporary reduction in benefits rather than termination.

4. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), is the only case in which this Court has held that the Due Process Clause requires an evidentiary hearing *before* a temporary interruption in government benefits. The Court recognized as much in *Eldridge* (424 U.S. at 340).

The outcome in *Goldberg* turned on the welfare context of that case. In the Court's words, "termination of [welfare] aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits" (397 U.S. at 264). Recoupment of Social Security overpayments is an entirely different matter. The harm that can be caused by an erroneous recoupment decision is minimized by the partial adjustment system, which generally prevents reduction of monthly benefits by more than 25%. Moreover, there is a significant possibility that Social Security recipients will have personal income or resources other than

their insurance payments;[28] where they do not, federal (and, in many cases, state) welfare benefits will be available to alleviate need. In other words, even if recoupment (pending an oral hearing) is erroneous, the consequence of the error is not nearly as severe as the consequence of an error in terminating welfare benefits.

C. Under the Secretary's Recoupment Procedures, the Risk of an Erroneous Deprivation Is Small

We have demonstrated above that errors in recoupment cases do not necessarily have serious consequences for beneficiaries. We argue below that the Secretary's procedures hold the risk of error to a minimum.

In weighing the risk of erroneous deprivations in the absence of additional or substitute procedures, the *Eldridge* Court focused on "the nature of the relevant inquiry" and the extent to which existing procedures "provide an effective means for the recipient to communicate his case to the decisionmaker" (424 U.S. at 343, 345). The Court observed that the medical assessments necessary for resolution of disability issues are particularly well suited to presentation in documentary form. In addition, the Court noted that the

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[28] Indeed, Social Security Administration statistics indicate that of all the overpayments to old-age and survivors' insurance beneficiaries during the first nine months of 1978, nearly 65% were attributable to the beneficiaries' own excess earnings, as reflected in annual earnings reports filed by the beneficiaries themselves.

procedures employed were designed to inform recipients of the factors likely to be critical in the entitlement decision, to ensure recipients full access to information on which the decisionmaking agency relied in reaching its initial determination, and to afford recipients an opportunity to respond to that evidence identified by the decisionmaker as most significant (424 U.S. at 345-346). The Court concluded that, under these circumstances, the lack of an evidentiary hearing prior to termination of disability benefits did not create an intolerable risk of error.

By contrast, when the Court addressed the subject of welfare terminations in *Goldberg* v. *Kelly*, *supra*, it held that exclusive reliance on written submissions violated the Due Process Clause. Where the criterion for public assistance is "need," issues of witness credibility may be of central importance. Documentary evidence alone may be inadequate to describe fully the economic situation of a welfare family. The *Goldberg* Court also stressed that persons threatened with termination of welfare benefits frequently cannot write effectively (397 U.S. at 269). Moreover, the procedure under scrutiny in *Goldberg* provided no indication of the decisionmaker's prime factual concerns in individual cases and thus did not permit recipients to shape their arguments to meet those concerns (*ibid.*). The risk of error in this situation was too great to permit the resolution of disputes on written submissions alone.

1. *Reconsideration Cases*

As the court of appeals found, when a Social Security beneficiary requests reconsideration of a determination that an overpayment has occurred, the relevant inquiry is likely to be one "well suited to resolution by documentary proof" (Pet. App. 24A). The questions asked by the decisionmaker will be simply: "Did an overpayment occur, and, if so, how much was it?" In the overwhelming majority of cases, these questions will be answered by arithmetic computations using figures derived from cancelled checks, Social Security payment records, and similar documentary evidence. The court of appeals recognized that "written submissions are adequate to effectively communicate these matters" and therefore held that the Secretary's recoupment procedures do not involve an "undue risk of erroneous deprivation" in reconsideration cases (*ibid.*).[29]

Notwithstanding this general conclusion, however, the court of appeals refused to acknowledge that pre-recoupment oral hearings are not required. Rather, the court ruled that if a request to reconsider whether an overpayment has occurred raises a credibility issue that could affect the outcome, then the beneficiary is entitled to a pre-recoupment hearing. This qualifi-

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[29] Indeed, respondents did not argue in the court of appeals, and they do not argue in this Court (Br. in Opp. 15-18), that reconsideration cases generally require a prior oral hearing (Pet. App. 24A n.22).

cation of the general rule governing reconsideration cases ignores the admonition in *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 344, that "procedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions."

Because the court of appeals insisted that an opportunity for a pre-recoupment hearing be provided in some reconsideration cases, the Secretary has offered such a hearing to all Social Security beneficiaries who have requested reconsideration of the determination that an overpayment has occurred (see note 19, *supra*). The Secretary regards this alternative as preferable to examining each request individually to see whether a credibility issue might be involved. The latter process would entail considerable administrative expense, and an incorrect decision on whether to offer a pre-recoupment hearing could lead to reversal on judicial review. This case thus illustrates the undesirable consequences of a rule under which the agency cannot know, until the case is over and a court has spoken, what procedures it should have used. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546-548 (1978). In light of the court of appeals' recognition that reconsideration issues ordinarily lend themselves to documentary resolution, the Due Process Clause does not require a pre-recoupment evidentiary hearing in those comparatively rare cases in which a reconsideration request raises a credibility issue.[30]

2. *Waiver Cases*

Turning to cases in which a beneficiary seeks waiver of recoupment of an admitted overpayment, the court of appeals identified three issues that the Secretary must address. A request for waiver requires the Secretary to determine: (1) whether the beneficiary was at fault in receiving or retaining the overpayment; (2) the extent of the beneficiary's financial dependence on his monthly Social Security benefits; and (3) whether and to what extent the beneficiary relied to his detriment on the overpayment (Pet. App. 25A). In the court of appeals' view, these issues, particularly the first and the third, inevitably turn on the credibility of the claimant and other witnesses and therefore cannot reliably be resolved through written submissions (*id.* at 26A-30A). By contrast, according to the court, the medical disability inquiry reviewed in *Eldridge* involves a relatively objective assessment of a beneficiary's physical and mental condition on the basis of clinical and laboratory evidence.

The court of appeals has drawn too sharp a distinction between the critical issues faced by the Secre-

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[30] The Third Circuit reached this conclusion in *Mattern* v. *Mathews*, 582 F.2d 248, 256-257 (1978), petition for cert. pending *sub nom. Califano* v. *Mattern*, No. 78-699. (For the reasons discussed elsewhere in the brief, we disagree with the remaining portions of the holding in *Mattern*.)

tary in deciding whether to waive recovery of Social Security overpayments and the issues relevant to a decision on whether disability insurance benefits should be terminated. The court has overestimated the role of the claimant's credibility in the former decisions and underestimated its role in the latter.

The central inquiry in the termination procedures approved in *Eldridge* is whether a disability beneficiary is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment * * *." 42 U.S.C. 423(d)(1)(A); 424 U.S. at 336. In some cases the result of this inquiry may well depend on subjective factors, such as the degree of pain experienced by the claimant or the debilitating effect of mental disorders, periodic "blackouts," or alcoholism. See, *e.g.*, *Sayers* v. *Gardner*, 380 F.2d 940 (6th Cir. 1967); *Young* v. *Weinberger*, 366 F. Supp. 81 (D. Md. 1973). The Court recognized in *Eldridge* that "credibility and veracity may be a factor in the ultimate disability assessment in some cases" (424 U.S. at 344). Nonetheless, the mere fact that the claimant's credibility may be at issue did not lead the Court to require pre-termination oral hearings.

On the other side of the coin, the claimant's credibility may not be as important a factor in waiver determinations as the court of appeals thought. The Secretary's regulations (20 C.F.R. 404.507, 404.510-404.511) provide that a beneficiary is "at fault" in receiving or retaining an overpayment if he knew or should have known that the payment was incorrect

or was based on incomplete or inaccurate information. The regulations thus incorporate an objective standard of fault that depends on the exercise of reasonable care rather than on individual good faith.

The court of appeals' statement that "[t]he decisionmaker has to hear the claimant's story and perception of the facts in order to determine whether he 'should have known'" (Pet. App. 28A n.23) is unconvincing. Most beneficiaries will be able to describe in writing any individual limitations that the Secretary should consider in determining fault under the "reasonable person" standard. Indeed, this Court decided in *Eldridge* that such personal characteristics as age, education, and physical and mental condition are amenable to written presentation (424 U.S. at 343-347 & n.28). The court of appeals therefore overstated the importance of credibility evaluations and the need for a personal appearance in the waiver context.

3. *General Considerations of Reliability*

Even if the issues relevant to waiver are more diffuse than those relevant to the cessation of medical disability, this does not mean that decisions based on written submissions are likely to be unreliable.[31] The Secretary's recoupment procedures are calculated to apprise beneficiaries of the facts deemed pertinent by

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[31] That considerations may be diffuse does not necessarily mean that the Due Process Clause calls for additional safeguards. See *Board of Curators* v. *Horowitz*, 435 U.S. 78 (1978).

the decisionmaker and to enable beneficiaries to respond meaningfully to unfavorable initial findings. The Secretary informs beneficiaries of the reasons for overpayment determinations and thereby permits Social Security recipients "'to mold [their] argument[s] to the issues the decision maker appears to regard as important.'"[32] *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 345, quoting *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 269. Specific forms are provided for reconsideration and waiver requests, and beneficiaries are guaranteed access to the files containing information on the overpayments they allegedly received. See 20 C.F.R. 401.3(a). Beneficiaries may submit whatever documentation they wish in support of their claims, and they may consult with the appropriate Social Security district office concerning the reasons for the Secretary's overpayment or waiver determinations. In short, the Secretary's recoupment procedures contain ample safeguards against mistake.

This conclusion is supported by experience. The district court's order in *Buffington* was not stayed pending appeal. Accordingly, after an initial period of preparation during which no overpayments were

[32] Of course, where the beneficiary requests waiver, *he* frames the relevant issues in the first instance. The beneficiary himself decides why he should not be found "at fault" and why, in his particular circumstances, recovery of an overpayment would defeat the purpose of Title II of the Social Security Act. Accordingly, there is much less reason to permit a pre-recoupment response to a denial of waiver than there is to allow the beneficiary to challenge the correctness of the Secretary's overpayment determination before recovery begins.

recovered, the Secretary began to offer pre-recoupment evidentiary hearings. The first such hearings were held in January 1977. Approximately 1.25 million Social Security old-age and survivors' insurance beneficiaries are overpaid annually.[33] In calendar year 1977, 42,880 persons (3.4% of this group) requested waiver of recoupment.[34] After determinations

[33] This is the class covered by the *Buffington* injunction. During the first nine months of 1978, the average overpayment to persons overpaid under the old-age and survivors' insurance program was $532.11. Recovery of this average overpayment over the 48-month period permitted by the new Claims Manual provisions would result in the withholding of approximately $11 monthly from Social Security benefit checks.

The class in *Elliott* also includes disability insurance beneficiaries living in Hawaii. Nationwide, approximately 200,000 disability beneficiaries are overpaid annually. During the first nine months of 1978, the average overpayment to persons in this group was $689.65. Recovery of this average overpayment over the 48-month period permitted by the new Claims Manual provisions would result in the withholding of approximately $14.50 monthly from disability insurance payments.

[34] The corresponding figures for the first nine months of 1978 indicate that the rate of waiver requests is remaining nearly constant. During that period, the Secretary determined that 964,646 old-age and survivors' insurance beneficiaries received overpayments, and 34,233 (3.5%) requested waiver. (The Social Security Administration reports that the number of beneficiaries who seek reconsideration and not waiver is negligible.)

The rate of waiver requests among overpaid disability beneficiaries is substantially higher. Of 154,271 persons who the Secretary determined had received disability overpayments during the first nine months of 1978, 47,762 (31.0%) requested waiver.

based on the beneficiaries' written submissions, approximately 19,400 requests (45.3%) were granted.[35]

Of the approximately 23,480 recipients whose waiver requests were denied, 1,282 (5.46%) sought a pre-recoupment oral hearing. Results of this group of hearings have not yet been tabulated. However, of the first 2,084 personal conferences held under the *Buffington* injunction between January 1977 and October 1978,[36] 623 (30%) resulted in reversal of previous waiver denials. At this rate, the personal conferences requested in 1977 can be expected to produce approximately 385 grants of waiver. Thus, of the 1.25 million persons who the Secretary initially concludes have been overpaid each year, approximately 385—or 1.6% of those who were denied waiver following written proceedings of the sort the Secretary supplied before the *Buffington* injunction, and 0.03%

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[35] Figures for the first nine months of 1978 show a slightly higher percentage of waiver requests granted. Of the 34,233 requests filed by old-age and survivors' insurance beneficiaries, 16,600 (49.7%) were granted. Of the 47,762 requests filed by disability insurance beneficiaries, 24,662 (51.6%) were granted.

The high rate of waiver grants belies the court of appeals' assertion that "most of the factors involved in a waiver determination are not capable of resolution by written submissions" (Pet. App. 30A). This Court has said that a similar reversal rate in a different context under the Social Security disability insurance program "attests to the fairness of the system and refutes the implication of impropriety." *Richardson* v. *Perales*, 402 U.S. 389, 410 (1971).

[36] Many of these conferences were requested in the period before 1977.

of those whose payments are recouped—would obtain a different result under a pre-recoupment oral hearing procedure.

Perhaps the most noteworthy statistics are the low percentage of persons who seek waiver of recoupment, and the low percentage of those denied waiver who seek an oral hearing. The error rate certainly compares favorably with that discussed by this Court in *Eldridge* (424 U.S. at 346-347 & n.29). Nonetheless, the court of appeals concluded that the Secretary's recoupment procedures are error-prone. It relied for this conclusion on the high success rate of those who challenge overpayment determinations and waiver decisions (Pet. App. 32A, 74A; see also Pet. App. 99A-100A). *Eldridge*, however, teaches that "in order fully to assess the reliability and fairness of a system of procedure, one must also consider the overall rate of error for all denials of benefits." 424 U.S. at 346 n.29; see also *Fusari* v. *Steinberg*, 419 U.S. 379, 383 n.6 (1975). Viewed from this perspective, the Secretary's procedures are highly reliable and involve no more than a trival (0.03%) risk that deserving beneficiaries will be deprived of Social Security insurance payments during the period between the start of recoupment and the availability of an oral hearing.

D. The Secretary Has a Legitimate Interest in Retaining the Procedures He Has Designed for the Recovery of Social Security Overpayments

The last of the considerations listed in *Eldridge* is "the public interest," particularly "the administrative burden and other societal costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to" a deprivation of benefits (424 U.S. at 347). Admitting the difficulty of predicting the magnitude of such increased costs, the Court stated that "experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial" (*ibid.*).

The Court's judgment is confirmed by the facts of this case. Because of the Secretary's efforts to minimize the financial imposition on beneficiaries and the risk of error, the recovery of Social Security overpayments already is a protracted process. When the new Claims Manual provisions become effective in January 1979, recoupment routinely will extend over a four-year period. Moreover, recoupment does not even begin until the beneficiary has received 30 days' notice and the Secretary has acted on any request for reconsideration or waiver. These procedural safeguards inject significant delay into the recoupment system and thereby impose substantial costs on the Social Security trust fund. The Secretary estimates that the delay generated by the existing notice, reconsideration, waiver, and partial adjustment pro-

cedures annually deprives the trust fund of several million dollars in unrecovered overpayments. The 30-day notice period alone results in an annual loss of at least $850,000 in interest that could be earned if overpayments were recovered more expeditiously.[37] This is not to say, of course, that the notice period should be eliminated or that any of the existing procedural protections are undesirable. It is only to indicate that substantial costs are associated with such devices, and new procedural requirements should not be imposed without careful consideration of the additional costs involved. The court of appeals simplifies too much when it concludes that pre-recoupment oral hearings will "merely require the Government to exercise a little forebearance before taking money

[37] The $850,000 figure is derived from statistics available for the first nine months of 1978. Those statistics indicate that approximately $685 million will be overpaid to Social Security old-age and survivors' insurance beneficiaries in 1978. If all of these overpayments were fully recovered over a 48-month period, the average monthly recovery would be $14.3 million. At a 6% annual rate of interest, delaying these monthly recoveries by 30 days would cost approximately $850,000 per year.

For greater accuracy, these figures would need to be adjusted to take account of the facts that overpayments are recovered at different rates and that some are not fully recovered. But there is little chance that the $850,000 estimate of the annual interest cost of the 30-day notice period errs by being too high. This is so because the figures on which the estimate is based do not reflect in any way the delay connected with recovery of overpayments to beneficiaries of Social Security *disability* insurance. If disability overpayments were included in the preceding calculations, the interest cost of the 30-day notice period could only increase.

from the claimants via recoupment" (Pet. App. 33A). This remark assumes that no one loses when the Secretary defers recovery of monies owing to the trust fund. It ignores the fact that the Secretary is obliged to protect the interests of all Social Security recipients, not just those of overpaid beneficiaries.

Pre-recoupment oral hearings inevitably entail significant delay. At present, the average period of time between a beneficiary's request for a personal conference and the administrative decision after such a conference is approximately 160 days. The evidentiary hearings ordered by the court of appeals thus already have imposed new costs on the administration of the Social Security program. The Secretary estimates that the direct cost of conducting 1,200 oral hearings annually is $100,000. This does not include losses incurred because of inability to recover overpayments after a prolonged pre-recoupment period (during which the recipient may have died or become ineligible for some other reason). It also does not include the loss of interest on overpaid funds whose recovery is delayed. The expense of establishing and maintaining a personal conference system with trained staff is another cost that must be added. And, perhaps most importantly, the Secretary's estimate does not include the costs of delay introduced elsewhere in the administrative process, as scarce resources are devoted to hearings in recoupment cases. The delay hurts both applicants for new benefits and existing beneficiaries when the unavailability of staff prevents the processing of new claims and post-entitlement actions.

Moreover, there is a significant possibility that the number of oral hearings will increase as Social Security recipients increase in number and become more familiar with the available procedures. Of even greater significance are the possible implications of the court of appeals' decision in non-recoupment cases and cases not involving the Social Security program. To the extent this case represents the court of appeals' judgment that beneficiaries of government programs generally are entitled to pre-action hearings, it can be expected to spawn a series of requests for such hearings in a variety of other programs. For example, Social Security recipients facing termination or suspension of benefits may well claim entitlement to an evidentiary hearing before adverse administrative action, on the ground that *Eldridge* is limited to medical disability cases.

The prospect of increased demand for pre-deprivation hearings is not purely speculative. In *Shannon* v. *United States Civil Service Commission*, 444 F. Supp. 354 (N.D. Cal. 1977), appeal pending, No. 78-1933 (9th Cir.), the district court held that retired federal employees are entitled to an evidentiary hearing before the Civil Service Commission may begin recovery of annuity overpayments or may deduct uncollected federal health and life insurance premiums from annuity checks.[38] In addition, in

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[38] The Ninth Circuit has stayed proceedings on the Commission's appeal pending this Court's disposition of the present case.

Pope v. *Railroad Retirement Board* and *Thrash* v. *Railroad Retirement Board*, Civ. Nos. 77-2166 and 78-0313 (D. D.C.), plaintiffs have challenged the Board's procedures for recovery of erroneous overpayments under the Railroad Retirement Act of 1974, 45 U.S.C. (Supp. V) 231i. A major issue in the litigation is whether the Board must provide pre-recoupment oral hearings in some or all cases. These lawsuits, together with the district court's ruling in *Shannon*, demonstrate that the court of appeals' decision in the present case is likely to have repercussions beyond the Social Security insurance program.

Apart from this potential effect, however, and apart from the additional fiscal burden imposed by a pre-recoupment hearing requirement, this case raises the larger question whether incorporation of judicial-type procedures in the administrative process necessarily ensures greater fairness, as respondents seem to assume. The Court in *Eldridge* addressed this question, and the Court's concluding remarks are especially relevant here (424 U.S. at 348-349):

> [M]ore is implicated in cases of this type than *ad hoc* weighing of fiscal and administrative burdens against the interests of a particular category of claimants. The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness. We reiterate the wise admonishment of Mr. Justice Frankfurter that differences in the origin and function of administrative agencies "preclude wholesale transplantation

> of the rules of procedure, trial, and review which have evolved from the history and experience of courts." *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). The judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances. * * * In assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals. * * * This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final.

In light of these considerations, and the arguments presented above, the court of appeals erred in holding that the Due Process Clause requires pre-recoupment oral hearings.

II

THE DISTRICT COURTS LACKED JURISDICTION TO AWARD RELIEF TO A NATIONWIDE CLASS INCLUDING PERSONS WHO HAVE NOT FILED ANY CLAIM WITH THE SECRETARY

A. The District Courts Did Not Have Mandamus Jurisdiction

1. *Section 205(h) of the Social Security Act Precludes Mandamus Jurisdiction in Actions to Recover on Social Security Insurance Claims*

a. Weinberger v. *Salfi*, 422 U.S. 749, 757 (1975), held that Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides the sole jurisdictional basis for judicial review of claims arising under Title II of the Act. Section 205(h), 42 U.S.C. 405(h), excludes other sources of jurisdiction.[39] The Court reaffirmed this conclusion in *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 327. See also *Califano* v. *Sanders*, 430 U.S. 99, 110-111 (1977) (Stewart, J., concurring). It follows that the district courts erred in relying on 28 U.S.C. 1361 as the source of jurisdiction in these actions.

We do not argue that the district courts lacked authority to adjudicate the claims of the individual class representatives. Section 205(g) itself confers

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[39] In pertinent part, Section 205(h) provides:

> No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

such jurisdiction, as the court of appeals recognized (Pet. App. 10A n.10). Section 205(g) authorizes judicial review of "any final decision of the Secretary made after a hearing to which [the person seeking review] was a party * * *." See *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 763-764. The Court in *Eldridge* interpreted the "final decision" language to require at least that "a claim for benefits shall have been presented to the Secretary." 424 U.S. at 328. All the class representatives in the present cases, with the possible exception of Ortiz, have requested reconsideration or waiver and thus have fulfilled the requirement that a claim be presented to the Secretary.

Eldridge further held that exhaustion of the administrative remedies prescribed by the Secretary may be omitted in appropriate cases and is not inevitably a prerequisite to district court jurisdiction under Section 205(g). 424 U.S. at 328, 330-332. None of the class representatives in these cases exhausted the opportunities for administrative review of the Secretary's overpayment and waiver determinations. As in *Eldridge*, however, the constitutional challenge to the Secretary's recoupment procedures is "entirely collateral" to any substantive claim of entitlement to benefits. Moreover, because respondents' due process argument depends in part on an assertion that erroneous recoupment "would damage [them] in a way not recompensable through retroactive payments," the Secretary's post-deprivation review procedures, whatever their outcome, would not answer fully the constitutional question here pre-

sented. *Id.* at 331-332. Accordingly, under *Eldridge*, the failure of the class representatives to exhaust their administrative remedies does not defeat the district courts' jurisdiction under Section 205(g).

b. As the court of appeals candidly acknowledged (Pet. App. 10A n.10), it sustained the district courts' exercise of mandamus jurisdiction under 28 U.S.C. 1361 largely because it wished to avoid any difficulties regarding the propriety of class relief under Section 205(g). But *Salfi* held that Section 205(g) provides the exclusive avenue for judicial review of claims under the Social Security old-age, survivors', and disability insurance program. Courts are not free to rely on other sources of jurisdiction merely because Section 205(g) does not authorize all possible forms of relief for all possible class members.

The court of appeals attempted to distinguish *Salfi* on the ground that the question involved in that case concerned the merits of a claim for benefits, whereas respondents' suits "assert a constitutional right to due process" (Pet. App. 12A). The court also stated that, in passing Section 205(h), Congress could not have intended to preclude district courts' jurisdiction under 28 U.S.C. 1361, because Section 1361 was not added to the Judicial Code until more than 20 years after the enactment of Section 205(h). Neither argument is persuasive.

The answer to the first point begins with *Salfi* itself. The case involved a constitutional challenge to the Social Security Act's "duration-of-relationship" requirement for recipients of survivors' insurance benefits. The Court held that, notwithstanding the

constitutional nature of appellees' complaint, Section 205(g) provided the only source of jurisdiction. 422 U.S. at 756-762. Before judicial review could be had, a claim for benefits had to be presented to the Secretary, even though he was powerless to alter the challenged statutory provisions. Although appellees' complaint was prompted by the Secretary's "nondiscretionary application of allegedly unconstitutional statutory restrictions" (*id.* at 762), the Court held that the lawsuit was an action to recover on a claim arising under Title II of the Social Security Act and that jurisdiction therefore was controlled by Section 205(h). *Mathews* v. *Eldridge*, *supra*, involved precisely the same kind of due process claim that respondents raise here, and the Court nevertheless stated that "[t]he only avenue for judicial review is 42 U.S.C. § 405(g)" (424 U.S. at 327).[40] Once again, the Court treated the suit as an action to recover on a claim arising under Title II, even though plaintiff asserted a constitutional right.

There is even more reason here than there was in *Salfi* to require the submission of a claim to the Secretary as a precondition to judicial review. The Secretary may well reconsider his decision or grant

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[40] Later in its opinion, the Court observed that because it had found jurisdiction available under Section 205(g), it did not need to "consider Eldridge's contention that notwithstanding § 405(h) there was jurisdiction over his claim under the mandamus statute, 28 U.S.C. § 1361" (424 U.S. at 332 n.12). See Pet. App. 13A n.12. The question of mandamus jurisdiction over Social Security claims was similarly reserved in *Norton* v. *Mathews*, 427 U.S. 524, 529-530 (1976).

waiver of recovery. In that event recoupment would never start, and the claimant would have no grievance requiring judicial resolution."[41] Courts need not adjudicate the constitutional arguments of persons who may never be aggrieved if they follow the Secretary's procedures.

Salfi and *Eldridge* thus demonstrate that Section 205(h) covers both substantive challenges to the constitutionality of particular Social Security Act provisions and due process attacks on the methods used by the Secretary to reduce or terminate benefits. In neither case may the effect of Section 205(h) be avoided simply by an assertion that the action arises under the Constitution.

The fact that Section 205(h) was passed before 28 U.S.C. 1361 also offers no support for the exercise of jurisdiction under Section 1361. As this Court observed in *Salfi* (422 U.S. at 756 n.3), the literal wording of 42 U.S.C. 405(h) "bars actions under 28 U.S.C. § 41. At the time § 405(h) was enacted, and prior to the 1948 recodification of Title 28, § 41 contained all of the title's grants of jurisdiction to United States district courts, save for several special-purpose jurisdictional grants of no relevance to the constitutionality of Social Security statutes." By precluding suits under 28 U.S.C. (1934 ed.) 41, there-

[41] In addition, where the constitutional grievance concerns not the provisions of a statute but the adequacy of procedures established by the Secretary, there is at least the possibility that the Secretary will change his procedures as the result of the administrative claim and thereby render judicial intervention unnecessary.

fore, Congress intended to make the Social Security Act itself the sole source of jurisdiction over actions to recover on claims arising under Title II.

Congress did not consciously abrogate this policy when, many years later, it extended to all federal district courts the mandamus jurisdiction previously exercised only by the United States District Court for the District of Columbia. The legislative history of 28 U.S.C. 1361 does not mention the Social Security Act, and there is no indication whatever that Congress envisioned Section 1361 as a means by which the jurisdictional limitations included in the Act could be circumvented. Although Congress could have amended Section 205(h) to reflect the recodification of Title 28 in 1948, its failure to do so did not prevent this Court from holding in *Salfi* that Section 205(h) precludes federal-question jurisdiction under 28 U.S.C. 1331. The Court has held in connection with similar problems caused by the 1948 recodification that it will not infer that Congress meant to change the meaning of the existing statutes. *Aberdeen & Rockfish R.R.* v. *SCRAP*, 422 U.S. 289, 309 n.12 (1975). See also *Fulman* v. *United States*, 434 U.S. 528, 538-539 (1978) (collecting cases). Under the principles of *SCRAP*, the reference to "section 41 of title 28" should be interpreted to include all general sources of federal jurisdiction, because that was the meaning the reference plainly had until the 1948 recodification.

Although Congress could have amended Section 205(h) to include a specific preclusion of Section

1361 jurisdiction after that Section's enactment in 1962, Congress' failure to pass such an amendment should not be viewed as a repeal of Section 205(h) by implication and a silent abandonment of the earlier legislative decision to limit jurisdiction over Social Security Act claims to that provided in the Act itself. The Court frequently has said that repeals by implication are not favored, and that a specific jurisdictional statute prevails over subsequent more general legislation. See, *e.g.*, *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976). These principles demonstrate that Section 205(g) continues to be the sole source of jurisdiction to review Social Security old-age, survivors', and disability insurance cases.

c. On at least one prior occasion, the Secretary has argued that Section 205(h) precludes jurisdiction under 28 U.S.C. 1361 even where a plaintiff has raised a colorable constitutional claim and jurisdiction under Section 205(g) is unavailable. See *Califano* v. *White*, No. 77-866, cert. denied, 435 U.S. 908 (1978), Pet. 15-17. Whatever may be the merits of this position, there is no reason to read Section 205(h) narrowly in cases like the present, where judicial review of the class representatives' due process claim is authorized by Section 205(g). No "serious constitutional question" (*Salfi*, *supra*, 422 U.S. at 762) is created by a statute giving any person a means to obtain judicial review if only he will follow the requirement to file an administrative claim. The

statute does not preclude judicial review; it simply establishes conditions for obtaining review.

The cases on which the court of appeals and respondents relied in support of jurisdiction under 28 U.S.C. 1361 are either irrelevant or unpersuasive. Two of the cases cited by the court were decided before *Salfi* and did not consider the effect of Section 205(h). See *Frost* v. *Weinberger*, 515 F.2d 57, 61-62 (2d Cir. 1975), cert. denied, 424 U.S. 958 (1976); *Martinez* v. *Richardson*, 472 F.2d 1121, 1125-1126 (10th Cir. 1973). A third case cited by the court of appeals, *Ryan* v. *Shea*, 525 F.2d 268, 271-272 (10th Cir. 1975), distinguished *Salfi* on the ground that it did not involve a procedural due process claim. As we have argued above (see pages 56-58, *supra*) this distinction is invalid. *Mathews* v. *Eldridge*, *supra*, fully answered the Tenth Circuit's concern that Section 205(g)'s exhaustion requirement would cause irreparable injury before a due process claim to a pre-deprivation hearing could receive judicial attention.

Respondents cite (Br. in Opp. 22) two additional cases that allegedly support the district court's exercise of jurisdiction under 28 U.S.C. 1361. See *White* v. *Mathews*, 559 F.2d 852, 855-856 (2d Cir. 1977), cert. denied, 435 U.S. 908 (1978); *De Lao* v. *Califano*, 560 F.2d 1384, 1388 (9th Cir. 1977). In *De Lao* the court of appeals' reference to Section 1361 is dictum, because the Secretary conceded and the court found that the district courts had jurisdiction under Section 205(g). Moreover, *De Lao* was

decided after and explicitly relied on the court of appeals' ruling in this case; it cannot provide support for that ruling. Finally, *White* raised a jurisdictional issue more difficult than that presented here.[42] Plaintiff alleged that the Secretary's delay in rendering his final decision violated the Due Process Clause. The court concluded that jurisdiction under Section 205(g) was unavailable because plaintiff could not await the Secretary's decision before challenging the delay in its issuance. In the absence of jurisdiction under 28 U.S.C. 1361, therefore, plaintiff's constitutional claim could not have been heard.[43] The court of appeals' recognition of mandamus jurisdiction in *White* does not compel a similar result here, where the class representatives' due process claim can be resolved under Section 205(g).[44]

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[42] We first mentioned *White* at page 60, *supra*.

[43] The jurisdictional result of *White* has been followed by three other circuits. See *Blankenship* v. *Secretary of HEW*, No. 76-2342 (6th Cir. Nov. 24, 1978), slip op. 2-4; *Wright* v. *Califano*, Nos. 78-1174 and 78-1175 (7th Cir. Nov. 16, 1978), slip op. 5-8; *Caswell* v. *Califano*, 583 F.2d 9 (1st Cir. 1978) (all finding jurisdiction under Section 205(g)). The courts have disagreed, however, on the merits of the argument that delay in holding a hearing violates either the Constitution or the Social Security Act.

[44] In addition to the cases cited by respondents and the court of appeals, there are several decisions under the Medicare Act, 42 U.S.C. 1395 *et seq.*, that raise similar problems. Section 205(h) of the Social Security Act is incorporated into the Medicare Act by 42 U.S.C. 1395ii. Section 205(g), however, is not incorporated. Instead of adopting a general judicial review provision, Congress chose to limit review of administrative actions under the Medicare Act to certain

2. *Even Apart from Section 205(h), These Cases Do Not Provide an Appropriate Occasion for the Exercise of Jurisdiction under 28 U.S.C. 1361*

The foregoing discussion concerns only the question whether Section 205(h) makes 28 U.S.C. 1361 unavailable as a source of jurisdiction in Social Security cases. Whether or not our argument on that point is correct, there is a serious question whether

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specific categories of disputes. See 42 U.S.C. 1395ff, 1395*oo*. Since *Salfi* a number of cases have approved district court review of procedural due process claims under the Medicare Act, notwithstanding the Act's incorporation of Section 205(h). The cases have cited different jurisdictional bases. See *Cervoni* v. *Secretary of Health, Education, and Welfare*, 581 F.2d 1010, 1017 (1st Cir. 1978) (jurisdiction based on 28 U.S.C. 1331) (dictum); *St. Louis University* v. *Blue Cross Hospital Service*, 537 F.2d 283, 291-292 (8th Cir.), cert. denied, 429 U.S. 977 (1976) (28 U.S.C. 1331); *Association of American Medical Colleges* v. *Califano*, 569 F.2d 101, 111-113 (D.C. Cir. 1977) (28 U.S.C. 1361, but only in limited circumstances, not for all constitutional claims) (dictum). See also *Humana of South Carolina, Inc.* v. *Califano*, Nos. 76-1953 and 76-2125 (D.C. Cir. Sept. 18, 1978) (apparently asserting jurisdiction under 28 U.S.C. 1331 to review Administrative Procedure Act claim arising in the Medicare context). At least one circuit has held that Section 205(h), as incorporated in the Medicare Act, bars district court review of certain procedural due process claims. See *Trinity Memorial Hospital* v. *Associated Hospital Service, Inc.*, 570 F.2d 660, 667 (7th Cir. 1977). The Seventh Circuit indicated, however, that the constitutional claim could be heard in the Court of Claims under 28 U.S.C. 1491. And see *American Association of Councils of Medical Staffs* v. *Califano*, 575 F.2d 1367 (5th Cir. 1978), pet. for cert. pending, No. 78-563. These cases illustrate the courts' uneasiness with any statutory scheme that threatens to preclude judicial review of constitutional challenges. That problem is simply not presented here, because of the jurisdictional grant in Section 205(g).

this is an appropriate case for the exercise of mandamus jurisdiction. Since the enactment of Section 1361 in 1962, this Court has not had occasion to consider the precise bounds of district court jurisdiction under that provision. The legislative history of Section 1361 indicates that the law was intended not to expand the scope of the mandamus jurisdiction previously exercised by the United States District Court for the District of Columbia,[45] but only to extend that jurisdiction to the other federal district courts. See S. Rep. No. 1992, 87th Cong., 2d Sess. 2-3 (1962).[46] This Court's decisions on review of man-

[45] This jurisdiction was derived not from Title 28, the Judicial Code, but from the pre-cession laws of Maryland. See 2 Stat. 103-104 (1801); *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838); Byse and Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308, 310-312 (1967).

[46] Professor Moore has taken the position that the requirements for mandamus jurisdiction under Section 1361 are the same as they were at common law. According to this view, "mandamus may be granted only when (1) the plaintiff has a plain right to have an act performed, (2) the defendant has a plain duty to perform it, and (3) there is no other adequate remedy available to the plaintiff." 1 *Moore's Federal Practice* ¶ 0.62[17], at 700.51 (2d ed. 1978). Similar statements concerning the prerequisites for mandamus jurisdiction under Section 1361 have appeared in the opinions of several federal courts. See, *e.g.*, *Carter* v. *Seamans*, 411 F.2d 767, 773 (5th Cir. 1969), cert. denied, 397 U.S. 941 (1970); *Lovallo* v. *Froehlke*, 468 F.2d 340, 343-344 (2d Cir. 1972), cert. denied, 411 U.S. 918 (1973); *Burnett* v. *Tolson*, 474 F.2d 877, 880 (4th Cir. 1973). Arguments for broader jurisdiction to review agency action have been made. See Byse and Fiocca, *supra*, 81 Harv. L. Rev. at 318-320; K. C. Davis, *Administrative Law Treatise* § 23.11 (1970) and §§ 23.09-23.10 (1970 Supp.). See also Note, *Mandamus in Administrative Actions: Current Approaches*, 1973 Duke L.J. 207.

damus actions brought before 1962 in the District of Columbia are therefore relevant to the proper construction of Section 1361.

In *United States ex rel. Girard Trust Co.* v. *Helvering*, 301 U.S. 540, 544 (1937), the Court referred to the "settled rule that the writ of mandamus may not be employed to secure the adjudication of a disputed right for which an ordinary suit affords a remedy equally adequate, and complete." Several courts of appeals have followed this approach and held that review under Section 1361 is an extraordinary remedy that should be employed only in exceptional circumstances and only where there is no adequate remedy at law. See, *e.g.*, *Cook* v. *Arentzen*, 582 F.2d 870, 876-877 (4th Cir. 1978); *Billiteri* v. *United States Board of Parole*, 541 F.2d 938, 946-947 (2d Cir. 1976); *Haneke* v. *Secretary of Health, Education, and Welfare*, 535 F.2d 1291, 1295-1296 (D.C. Cir. 1976); *City of Highland Park* v. *Train*, 519 F.2d 681, 691-692 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976).[47] Here, Section 205(g) provides an ade-

[47] See also cases cited in 1 *Moore's Federal Practice* ¶ 0.62 [17], at 700.53 n.18 (2d ed. & Supp. 1978). But see *Frost* v. *Weinberger*, 515 F.2d 57 (2d Cir. 1975), cert. denied, 424 U.S. 958 (1976); *Knuckles* v. *Weinberger*, 511 F.2d 1221 (9th Cir. 1975); *Brown* v. *Weinberger*, 382 F. Supp. 1092 (D. Md. 1974), aff'd, 529 F.2d 514 (4th Cir. 1975) (approving the exercise of jurisdiction under Section 1361 to review due process claims under the Social Security Act).

quate legal remedy (see pages 54-56, *supra* and 72, *infra*). Where such a remedy is available, mandamus jurisdiction is not, even if Congress has not explicitly said so. This is true because of the nature of mandamus jurisdiction. An "action in the nature of mandamus" under Section 1361 is not intended to function as a substitute or alternative to any one of the panoply of legal remedies made available by Congress in federal statutes. Rather, it is to serve as a means to compel the performance of a duty owed by a government official or agency, when no legal remedy would suffice to produce the desired relief. Because the class representatives' claim of entitlement to a pre-recoupment oral hearing can be fully adjudicated in a suit under Section 205(g) of the Social Security Act, the district court lacked jurisdiction under Section 1361.

B. Section 205(g) Does Not Authorize Class Relief, and in Particular Does Not Authorize the Class Relief Awarded in This Case

If the preceding arguments are correct and Section 205(g) is the only possible jurisdictional basis for these lawsuits, then the district courts erred in allowing the suits to proceed as class actions. Section 205(g) manifests a congressional intention to bar class actions and to permit adjudication of individual claims only.

1. Section 205(g) Authorizes Only Adjudication of Individual Claims

Section 205(g) authorizes "[a]ny individual" to sue in federal district court in order to obtain judicial re-

view of "any final decision of the Secretary made after a hearing to which [the plaintiff] was a party * * *." The district court in such a suit is empowered "to enter * * * a judgment affirming, modifying, or reversing the decision of the Secretary * * *." This statutory scheme contemplates case-by-case adjudication of individual claims. Such a procedure is an appropriate means for review of administrative decisions, the vast majority of which turn on particular facts.

To the extent the sparse legislative history of Section 205(g) is helpful, it supports the Secretary's position that Congress envisioned a system of judicial review of individual claims only. The reports of the Senate and House committees both indicate that Section 205(g) was intended to fill a gap in the Social Security Act as it was originally passed in 1935: "The present provisions of the Social Security Act do not specify what remedy, if any, is open to *a claimant* in the event *his claim* to benefits is denied by the [Social Security] Board." S. Rep. No. 734, 76th Cong., 1st Sess. 52 (1939); H.R. Rep. No. 728, 76th Cong., 1st Sess. 43 (1939) (emphasis added). Like the wording of the statute itself, this language reflects the congressional design to authorize district courts to review denials of individual claims.

Although this Court has never formally decided the issue, it has provided indications that class relief is not appropriate under the Social Security Act. See *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 763-764; *Jablon* v. *Califano*, 430 U.S. 924 (1977), summarily af-

firming 399 F. Supp. 118, 121-125 (D. Md. 1975). On the other hand, several courts of appeals have approved the use of class actions under Sections 205 (g). See, *e.g.*, *Jones* v. *Califano*, 575 F.2d 12 (2d Cir. 1978); *Liberty Alliance of the Blind* v. *Califano*, 568 F.2d 333 (3d Cir. 1977); *Johnson* v. *Mathews*, 539 F.2d 1111 (8th Cir. 1976); *Jimenez* v. *Weinberger*, 523 F.2d 689 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). These cases accord insufficient respect to the relevant statutory language and disregard the significant stare decisis effect of appellate decisions, even when rendered in cases involving only a single claimant. Contrary to the fears of the courts of appeals that have endorsed class actions under Section 205(g), the restricted version of judicial review permitted by that statute will have no detrimental effect on the efficient resolution of Social Security Act claims. When a statutory or constitutional issue is decided adversely to the Secretary in the course of judicial review obtained by an individual claimant, the Secretary will either appeal or abide by the unfavorable ruling. See *Philbrook* v. *Glodgett*, 421 U.S. 707, 720-722 (1975). Repetitious litigation will thus not be necessary in order to establish a general legal principle applicable beyond the confines of a particular case.[48] Stare decisis will impel the Secretary to follow statutory or constitutional decisions within the jurisdiction of the courts

[48] In some cases, however, additional litigation of an issue in additional jurisdictions is desirable. See pages 75-76, *infra*.

that have rendered them.[49] In short, neither the language of Section 205(g), nor its legislative history, nor considerations of practical efficiency support the use of class actions in the present context, and the district courts accordingly erred in allowing the named respondents to proceed as class representatives.

2. *Each Person Whose Claim Is To Be Adjudicated Must Satisfy the Jurisdictional Requirements of Section 205(g)*

At the very least, the district courts erred in awarding relief to class members who have sought neither reconsideration of overpayment determinations nor waiver of recovery. *Eldridge* held that the nonwaivable element of Section 205(g)'s "final decision" requirement is the filing of a claim with the Secretary. 424 U.S. at 328. *Salfi* stated that where class members have not filed any such claim, jurisdiction cannot be sustained under Section 205(g). 422 U.S. at 764. The certified classes in these cases include many persons who have not filed a claim challenging one of the Secretary's recoupment decisions.

[49] This is not a case like *Jones* v. *Califano*, *supra*, in which the repeated success of claimants on administrative review, coupled with the apparent failure of the Secretary to alter the practice that gave rise to the individual claims, threatened to preclude judicial review under Section 205(g) and to make the treatment of SSI beneficiaries depend on whether they sought an administrative hearing. Whatever may be the appropriate judicial response in such circumstances, a class action is not necessary here in order to obtain an authoritative decision on whether the Due Process Clause requires pre-recoupment oral hearings.

Indeed, the classes include many persons as to whom the Secretary has not even made an overpayment determination. The district court in *Buffington* certified a class of Social Security insurance beneficiaries whose payments "have been or will be reduced, suspended, terminated or otherwise adjusted without notice and opportunity for a prior hearing * * *" (A. 222). The court in *Elliott* used similar language (A. 35, 37-38). Both district courts therefore exercised jurisdiction over persons who have not filed claims with the Secretary and thus have not satisfied the nonwaivable element of Section 205(g)'s "final decision" requirement.[50] *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), teaches that the class action device may not be used to confer jurisdiction over unnamed parties who otherwise could not invoke federal jurisdiction. Even if some class actions are permissible under Section 205(g), each class member must meet the requirements for invoking Section 205(g) jurisdiction,[51] just as each

[50] Moreover, because the classes in these cases are not subject to any temporal limitation, they include many persons whose suits do not fulfill Section 205(g)'s timing requirement. The statute provides that any civil action seeking review of a final decision by the Secretary must be filed within 60 days after the mailing of notice of that decision (or within such further time as the Secretary may allow). See *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 763-764.

[51] In his dissenting opinion in *Norton* v. *Mathews*, 427 U.S. 524, 533-538 (1976), Mr. Justice Stevens rejected the Secretary's argument that Section 205(g) does not authorize class actions; he did agree, however, that in any such action, every class member must satisfy the prerequisites to suit under

class member in *Zahn* had to satisfy the $10,000 jurisdictional amount requirement under 28 U.S.C. 1331.

3. *Section 205(g) Does Not Authorize Injunctive Relief*

The district courts also erred in enjoining the Secretary from recouping Social Security overpayments without first affording the affected beneficiaries an opportunity for an oral hearing. Section 205(g) does not authorize injunctive relief. As this Court noted in *Salfi* (422 U.S. at 763 n.8), the statute "contains no suggestion that a reviewing court is empowered to enter an injunctive decree whose operation reaches beyond the particular applicants before the court." Nothing in Section 205(g) indicates that Congress intended to authorize the exercise of equitable power to enjoin the operation of a federal statute or to direct that a statute be implemented through procedures other than those established by the Secretary. On the contrary, the grant of jurisdiction is limited to the "power to enter * * * a judgment affirming, modifying, or reversing the decision of the Secretary * * *." The statute confers no power beyond that necessary to enforce decrees in individual cases.

Equitable remedies such as an injunction are extraordinary forms of relief, available only when

Section 205(g). 427 U.S. at 535-537. But cf. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975) (construing a particular statutory scheme that does not pertain to jurisdiction, the Court holds that class relief is available on behalf of persons who have not filed administrative charges).

there is no adequate remedy at law. 4 Pomeroy, *Equity Jurisprudence* § 1338, at 935-936 (5th ed. 1941). An injunction is not available in a suit arising under Title II of the Social Security Act, because Section 205(g) provides an adequate legal remedy. Disputes between individual Social Security beneficiaries and the Secretary, including the present controversy over the need for pre-recoupment oral hearings, can be fully resolved through the simple expedient of "modifying, or reversing" the Secretary's decision, in this case the decision not to provide the requested hearing. If the reviewing court reverses the Secretary's decision to recover an alleged overpayment without first affording an opportunity for an oral hearing, the beneficiary will have obtained all the relief that he sought.[52] The Secretary will be unable to proceed with recoupment until he has offered the desired hearing. Further injunctive relief would have no utility to the individual claimant, and it is not contemplated by Section 205(g).

The restrictive language of Section 205(g) reflects Congress' determination that courts' general equitable powers do not pertain to claims and remedies under Title II of the Act. This case therefore is unlike *Renegotiation Board* v. *Bannercraft Clothing Co.*, 415

[52] And even if, in some cases, judicial relief were not provided until recoupment had commenced, that would not offer adequate reason to issue an injunction applicable to every case. Under "traditional standards * * * the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." *Sampson* v. *Murray*, 415 U.S. 61, 90 (1974) (footnote omitted). See also *id.* at 92 n.68.

U.S. 1, 18-20 (1974), *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 290-293 (1960), and *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 397-400 (1946), in each of which this Court decided that a limited statutory authorization of injunctive relief would support a somewhat broader equitable remedy or permit the grant of an injunction in circumstances different from those specifically contemplated in the relevant statute.[53] Here, by contrast, Section 205(g) does not authorize *any* equitable remedies. The present case is thus analogous to *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943). Although the Court in *Switchmen's Union*

[53] In *Bannercraft* the Court indicated that in an appropriate case the Freedom of Information Act may authorize a district court "to enjoin agency action pending the resolution of an asserted FOIA claim." 415 U.S. at 18-20. The Court's dictum was based in part on the Act's explicit authorization of a different kind of injunctive relief, namely, a decree "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. 552(a)(4)(B). The Court also relied on a series of cases establishing the principle that, in the absence of the clearest command to the contrary from Congress, courts retain power to enter injunctions to preserve their own jurisdiction or to maintain the status quo pending judicial or agency review through prescribed statutory channels. See *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U.S. 4 (1942); *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 671 n.22 (1963); *FTC* v. *Dean Foods Co.*, 384 U.S. 597 (1966); see also the All Writs Act, 28 U.S.C. 1651(a). These cases are inapplicable here, where Section 205(g) guarantees district court jurisdiction to review final decisions by the Secretary and where the relief available under Section 205(g) is adequate to redress erroneous decisions.

found a complete lack of jurisdiction for judicial review of agency action rather than merely a statutory restriction on the remedies that a reviewing court could award, the Court's opinion is instructive in the present context. The Court stated (*id.* at 301):

> Congress for reasons of its own decided upon the method for the protection of the "right" which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. * * * All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. *Tutun* v. *United States*, 270 U.S. 568, 576-577. In such a case the specification of one remedy normally excludes another.

See also *United States* v. *Babcock*, 250 U.S. 328, 331 (1919) ("where a statute creates a right and provides a special remedy, that remedy is exclusive"); *Cell Associates* v. *National Institutes of Health*, 579 F.2d 1155, 1159-1162 (9th Cir. 1978) (no injunctive relief for a violation of Section 3(b) of the Privacy Act of 1974, 5 U.S.C. 552a(b), because Congress provided a damages remedy for such violations and did not authorize injunctive relief, even though it did provide an injunctive remedy for violations of other portions of the Act). These decisions demonstrate that courts should not simply assume the power to award injunctive relief where Congress (in Section 205(g)) has provided an adequate legal remedy and (in Section 205(h)) has manifested an intention that that remedy be exclusive.

4. *Relief That Runs Nationwide Is Inappropriate*

The *Buffington* court's decision to award injunctive class relief is particularly objectionable because of the nationwide character of the class certified in that case. Certification of nationwide classes precludes the reasoned consideration of a difficult legal problem by more than one court. The first case to reach decision forecloses the opportunity for further debate. Moreover, the unnecessary granting of nationwide relief against federal officers places undue burdens on this Court. Holdings that might not warrant the Court's immediate review if relief had been narrowly tailored inevitably assume substantially greater significance when the relief requires revision in the nationwide administration of a federal program. Thus the unnecessary granting of nationwide relief by a lower court may have the practical effect of forcing this Court to undertake what otherwise might be viewed as premature consideration of complex and important issues. See *E. I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 135 n.26 (1977); *Maryland* v. *Baltimore Radio Show*, 338 U.S 912, 918 (opinion of Frankfurter, J., respecting the denial of certiorari) ("It may be desirable to have different aspects of an issue further illuminated by the lower courts. Wise adjudication has its own time of ripening"), quoted in *Singleton* v. *Commis-*

sioner, No. 78-78 (Oct. 30, 1978) (opinion of Stevens, J., respecting the denial of certiorari).[54]

Equity jurisprudence teaches that where injunctions are available they should be used sparingly. *Irwin* v. *Dixion*, 50 U.S. (9 How.) 10, 33 (1850). As a general rule, injunctive relief should do no more than afford redress to the complaining parties; it should be no more burdensome on the defendant than is necessary to provide complete relief to the plaintiffs. See, *e.g.*, *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977); *Whitcomb* v. *Chavis*, 403 U.S. 124, 160-161 (1971). See also *Milliken* v. *Bradley*, 418 U.S. 717 (1974). A court order compelling the Secretary to offer pre-recoupment hearings to all overpaid Social Security old-age and survivors' insurance beneficiaries violates this sound principle governing the exercise of courts' equitable powers.

---

[54] There is no more reason to permit the certification of a nationwide class in Social Security cases than there would be in, say, income tax refund suits or petitions to set aside orders of the NLRB. As the Second Circuit put the matter with respect to an argument that the doctrine of collateral estoppel confines the government to a single appellate resolution of tax questions: the laws affect many persons and raise complex issues, so that judges may be expected to disagree on their resolution; the first court to decide the question may not do so correctly; yet giving collateral estoppel effect to the first decision would foreclose further consideration. Any judicial decision that forecloses consideration and thus impairs this Court's ability to decide the issue "would be imprudent, if not irresponsible." *Divine* v. *Commissioner*, 500 F. 2d 1041, 1049 (2d Cir. 1974).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

PERTINENT PROVISIONS OF THE SOCIAL SECURITY CLAIMS MANUAL, EFFECTIVE JANUARY 1979

5503. Written Notice

When it is determined that an overpayment has been made, the person liable for repayment should be notified in writing (see § 5508.5 for sample letters). The notice will inform the person of:

(a) The incorrect payment made and how and when it occurred (i.e., the overpaid amount, the monthly amount, if any, which should have been paid, why the different amount was due, the months for which the different amount should have been paid, and the amount which was paid for those months). If the overpayment resulted from the entitlement of another beneficiary, the adversely affected individual(s) must be informed of the name, relationship to the NH [*i.e.*, the wage earner], and basis for entitlement of the new beneficiary (§ 4571(a)).

(b) The right to request reconsideration of the overpayment determination.

(c) The required recovery, including the proposed adjustment (§ 5513.1) or the request for refund where adjustment is not possible.

(d) The right to consideration under the waiver provision of the law.

(e) The availability of a different rate of adjustment when adjustment has been proposed or of installment refunds when adjustment is not available.

(f) The need to notify the DO promptly if the person feels that the circumstances in the case would justify reconsideration, waiver, a different rate of adjustment, or installment refund.

* * * * *

5513.1 Proposed Rate of Adjustment

(a) 25-Percent Withholding

When adjustment is the method of recovery of an overpayment which does not involve fraud (see (b) below), a withholding of 25 percent of a person's full monthly benefit (before any SMI [Medicare] premium deduction and rounded up to the next whole dollar) will be proposed. Since 25-percent withholding will be applied only to the benefit amount (e.g., before SMI premium deduction, VR [vocational rehabilitation] deduction, GP [governmental pension] offset, etc.) which is due the person from whom recovery is sought, full withholding may result for a month for which only a partial benefit is payable (e.g., because of the charging of excess earnings). Similarly, when a combined check [*i.e.*, a check including benefits payable to a beneficiary and his spouse or a check including benefits for more than one child of a beneficiary] * * * is involved, the 25-percent withholding will be applied to the amount due the person from whom recovery is sought and not simply against the total amount of the combined check.

The 25-percent withholding does not apply to the withholding of benefits to offset current year work and earnings (i.e., current year work suspension ad-

justments) but does apply to the adjustment of penalty deductions.

See § 5515.8(c) if an overpayment is currently being adjusted.

(b) 25-percent Withholding Not Permitted in Fraud Situations

Regardless of a beneficiary's alleged financial circumstances, never propose 25-percent withholding to recover an overpayment which was the result of fraud (i.e., an intentional false statement or representation by the person against whose benefits adjustment is being made, or by his willful concealment of or deliberate failure to furnish material information—§ 7505). In such situation, full withholding of the benefit to adjust the overpayment is required, except that the amount necessary for the SMI premium may be withheld for that purpose rather than to reduce the overpayment.

However, since the legal assistant will generally establish fraud only after an overpayment has been determined and adjustment proposed (§ 5500(c)), the initial notice of overpayment will rarely propose full withholding. If at any subsequent point the legal assistant determines that the overpayment was caused by fraud (whether or not prosecution is being recommended), take action to withhold the full monthly benefit (except for any SMI premium) to recover the balance of the overpayment.

DIFFERENT RATES OF ADJUSTMENT

5515. Different Rate of Adjustment

(a) General

When a person currently eligible for payment of title II benefits is liable for repayment of an overpayment, the initial notice of overpayment (§ 5503) will propose recovery of the overpayment by a withholding of 25 percent of the full amount of the benefit payable (§ 5513.1). The proposed rate of withholding may not be required, however, if a request for waiver or a different rate of adjustment is received (§ 5503.55).

(b) When to Consider Different Rate of Adjustment

When a person against whom adjustment has been proposed (or whose benefit is being withheld) for purposes of overpayment recovery does not take issue with the overpayment or its recovery and clearly requests only a different rate of adjustment, it will often be necessary to know only the amount of the overpayment and the person's monthly benefit to decide if the rate requested may be granted. When a different rate of adjustment only is requested, never have the person complete an SSA-561 [the reconsideration request form]. Have the person complete an SSA-632 [the waiver request form] (i.e., to permit findings as to fault and defeat the purpose) only if the person requests (1) a withholding of less than $10 a month or (2) a rate of withholding which would not complete recovery within 48 months (or before a termination of entitlement).

Conversely, a request for waiver of recovery which must be denied should always result in consideration of a different rate of adjustment. Note that, if waiver depends upon a finding of defeat the purpose of title II and the beneficiary does not have the incorrect funds in his possession (§ 5546) and needs only part of his monthly benefit for ordinary and necessary living expenses (§§ 5550-5551), waiver should be denied and adjustment at the rate he can afford to repay established. However, if it would be necessary to withhold less than $10 a month to preclude a finding of defeat the purpose, approve waiver rather than establish the lower adjustment rate if the person is without fault. Of course, if the person is at fault in causing the overpayment, waiver cannot be approved, and the rate of adjustment should be established in accordance with § 5515.4(c).

(c) Reasons for Different Adjustment Rates

A flexible rate of adjustment to recover an overpayment serves three basic purposes:

(1) If the person is dependent upon some of his monthly benefit for ordinary and necessary living expenses, withholding only part of the benefit each month eases the financial situation to some extent by permitting the person to rely upon a part of the benefit to meet current basic needs during the recovery period.

(2) If the waiver depends upon whether full or partial adjustment would defeat the purpose of title II (§§ 5550-5551), withholding a lesser part of a monthly benefit may permit a denial of waiver (i.e.,

the overpayment can be recovered without depriving the beneficiary of funds needed for ordinary and necessary living expenses); or

(3) If monthly benefits payable to an SMI enrollee are subject to withholding to recover an overpayment, application of part of the monthly benefits to pay his SMI premiums:

(A) facilitates the collection of the premiums;

(B) reduces the cost of premium collection by eliminating direct billing; and

(C) helps the individual retain his SMI coverage.

5515.4 Establishing Different Rate of Adjustment

(a) General

If the beneficiary requests a different rate of adjustment or a request for waiver must be denied, the rate of adjustment established will depend on the facts in the particular case.

If a withholding greater than the proposed 25-percent rate of adjustment (or the adjustment in effect) is requested, grant the request without development.

If a lesser withholding is requested, grant the request without development unless (1) recovery at the rate requested would not complete recovery within 48 months (or before the termination of entitlement), or (2) the rate requested is less than $10 a month. When a request for a lesser rate of withholding must be developed (i.e., recovery would not

be completed within 48 months or before termination, or the rate of adjustment would be less than $10 monthly), the development is the same as for waiver (i.e., whether or not the person is without fault and whether or not recovery would defeat the purpose of title II) and a waiver determination should be made.

Generally, the amount withheld will be the rate requested unless (1) financial circumstances would permit a greater withholding, or (2) the person is at fault and the rate requested is less than 25 percent of the monthly benefit and would not permit full recovery within 48 months (or before termination of entitlement). (NOTE: Whenever reference is made to recovery within 48 months in this section, consider whether entitlement will terminate before completion of a 48-month recovery period, and, if so, use the nearer date in setting the recovery period.) Where the suggested amount of withholding is less than 25 percent of the monthly benefit and would not result in full recovery with 48 months (or before termination), the withholding established should be 25 percent of the monthly benefit or, if less, the amount necessary to complete recovery in 48 months (or before termination of entitlement).

Note that a withholding of less than the full monthly benefit (except for the SMI premium, where applicable) is not permitted if fraud is involved (§ 5513.1(b)).

(b) When to Develop—Waiver Not Requested

When a lesser rate of adjustment is requested and the lesser rate of adjustment would not permit the overpayment to be recovered within 48 months or before termination of entitlement, develop fault and secure detailed financial information by having the beneficiary complete an SSA-632; establish the rate of adjustment in accordance with (d) below.

If the person requests a lesser rate of adjustment which will complete recovery within 48 months or before termination, presume that withholding at the 25-percent rate will cause financial hardship and grant the requested rate. Do not develop for fault or ability to repay.

Development is never required if the beneficiary requests a rate of adjustment greater than the proposed 25-percent withholding.

(c) Adjustment Rate—SSA-632 Not obtained

Where financial information was not obtained in connection with a request for waiver and development was not required by (b) above, adjust the overpayment at the rate requested.

EXAMPLE 1: Ed Adams is entitled to a monthly benefit of $100 a month and has been overpaid $240. A monthly withholding of $25 has been proposed. He requests a withholding of $15 a month. Since there is no available financial information which

would warrant a greater rate of adjustment (i.e., there is no reason to question the suggested rate) and the suggested rate will permit recovery in 16 months, grant the request by withholding $15 a month. Presumably the beneficiary is left with enough income to provide for his ordinary and necessary living expenses.

EXAMPLE 2: Geraldine Jones is overpaid $980, and a 25-percent withholding of her $200 monthly benefit has been proposed. She requests that the overpayment be recovered by withholding $20 a month from her benefit. Since withholding $20 for 48 months would not complete recovery of the overpayment, do not apply the financial hardship presumption. After developing fault and obtaining financial information, establish a rate of adjustment in accordance with (d) below.

(d) Adjustment Rate—SSA-632 Obtained

1. Person Without Fault

When a person is without fault, generally withhold that amount by which the beneficiary's income exceeds his expenses (unless he also has excess resources). However, withhold no less than

A. $10 per month (if it would be necessary based on a comparison of income and expenses to withhold less than $10, waive recovery; partial adjustment does not apply); or

B. the full monthly benefit (after deduction for any SMI premiums) to the extent of any incorrect funds in the beneficiary's possession (§ 5546).

If the beneficiary has excess resources (§ 5550.2), withhold (up to 100 percent exclusive of SMI premiums) at the rate permitted by the income/resources. Adapt the above guidelines by taking the resources, as well as any income which exceeds expenses, into consideration.

Also, if the criteria for waiver are not met and the beneficiary requests a greater rate of withholding than would be established using the above rules, adjust at the rate requested by the beneficiary.

EXAMPLE 1: Ellie Stone has been found without fault but must be denied waiver because she did not establish that recovery of a $3,000 overpayment would defeat the purpose of title II. Mrs. Stone does not have any of the incorrect funds in her possession, but she had monthly income (including an E benefit of $150) of $425 and expenses of only $375 a month. Her benefits will terminate in 6 months when her child attains age 18. Recover the overpayment by withholding $50 (i.e., income of $425 minus expenses of $375) a month, rather than the $32 initially proposed. (Had Mrs. Stone requested that, say, $65 be withheld, the rate of adjustment would be established as $65 a month.) When E benefits terminate, request refund of the overpayment outstanding (§ 5515.8(a)).

EXAMPLE 2: Paul Beta has been found without fault but must be denied waiver because he has not established that recovery of an $860 overpayment would defeat the purpose of title II. Although his expenses equal his income, he has the incorrect benefits of $860 in his possession. Although a withholding of only 25 percent of the monthly benefit had been proposed, do not grant partial adjustment; withhold Mr. Beta's full monthly benefit until the overpayment has been recovered.

2. Person At Fault

If the comparison of income/resources and expenses would indicate a withholding of less than 25 percent of the monthly benefit, establish the amount by which income/resources exceed expenses as the rate of adjustment provided full recovery will be completed within 48 months (or the beneficiary's expected last month of entitlement). However, if withholding of less than 25 percent of the benefit would not permit full recovery within 48 months (or, if earlier, the beneficiary's expected last month of entitlement), withhold 25 percent of the monthly benefit.

EXAMPLE 1: Zoe Wyler has been found at fault in causing a $1,080 overpayment and waiver must be denied even though her income, including a widow's benefit of $164, exceeds her expenses by only $5 a month. A withholding of $10 (the minimum rate of adjustment) will not complete recovery in 48

months; it is necessary to withhold $23 a month to recover the $1,080 overpayment in 48 months. (Had the overpayment been $7,900, recovery could not have been completed in 48 months even if the full $164 benefit were withheld; in such case, $41, or one-fourth the benefit, as initially proposed, should be established as the rate of adjustment.)

EXAMPLE 2: Lydia Lively received notice of a proposed withholding of $50 (i.e., 25 percent of her $200 monthly benefit) for 30 months to recover a $1,500 overpayment. Since her request for a withholding of only $25 a month would extend the recovery period to 60 months, fault and financial circumstances are developed.

A. A comparison of her income (and resources) and expenses would warrant a withholding of less than $10 a month. If she were without fault, recovery would have been waived. However, since without fault is not found, recovery must be denied; in such case, withhold $32 in order to complete recovery within 48 months.

B. Based on her financial circumstances, a withholding of $15 is warranted. If she were without fault, the rate requested (i.e., $25) would have been established. However, since she is at fault, it is necessary to withhold $32 in order to complete recovery within 48 months.

* * * * *

OVERPAYMENTS

5515.5—PARTIAL ADJUSTMENT CHART

FRAUD NOT ESTABLISHED	
REQUEST FOR LARGER WITHHOLDING	REQUEST FOR SMALLER WITHHOLDING
WITHHOLDING WOULD NOT COMPLETE RECOVERY WITHIN 48 MONTHS OR BEFORE TERMINATION OR IS LESS THAN $10	WITHHOLDING IS AT LEAST $10 AND WILL COMPLETE RECOVERY WITHIN 48 MONTHS OR BEFORE TERMINATION
No development required	No development required
Obtain SSA-632	Withhold at requested rate
To extent of any part of overpayment in beneficiary's possession, deny waiver; withhold full benefit If at fault, deny waiver; withhold amount (up to 25 percent of benefit) needed to complete recovery within 48 months or before termination, whichever is first If without fault *but* recovery would not defeat the purpose of title II, deny waiver; withhold amount by which income/resources exceed expenses If without fault *and* recovery would defeat the purpose of title II, waive recovery	Withhold at requested rate
FRAUD ESTABLISHED:	Withhold full benefit (except for SMI premium deduction)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1511

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Petitioner

v.

EVELYN ELLIOTT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1511

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Petitioner

v.

EVELYN ELLIOTT, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The Respondents adopt the summary of the Opinions Below which appears in the Brief for the Petitioner.

JURISDICTION

The Respondents adopt the statement of Jurisdiction which appears in the Brief for the Petitioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. The Fifth Amendment of the Constitution provides in pertinent part:

> No person shall be . . . deprived of . . . property, without due process of law . . .

2. Sections 204(a) and (b) of the Social Security Act, 42 U.S.C. 404(a) and (b) set forth the prerequisites for recoupment of past overpayments from present benefits. § 204(a) states in relevant part:

> (a) Whenever the Secretary finds that more or less than the correct amount of payments has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:
>
> (1) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the payments to such overpaid person, or shall apply any combination of the foregoing . . .;

while § 204(b) requires that:

> (b) In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

The applicable regulations and procedures of the Department of Health, Education and Welfare are set forth in pertinent part at Appendices A and B herein.

QUESTIONS PRESENTED

1. Whether either § 204(b) of the Social Security Act or the due process clause of the fifth amendment requires that recipients of social security benefits be provided an opportunity for an oral evidentiary hearing on the issue of waiver before rather than after their monthly benefits are reduced or suspended in order to recoup an overpayment.

2. Whether the district courts had jurisdiction under either 28 US.C. § 1361 or 42 U.S.C. § 205(g) to issue classwide injunctive relief to Social Security recipients whose claims for waiver of recoupment are decided by the Secretary without providing an opportunity for an oral pre-recoupment hearing.

STATEMENT OF THE CASE

These consolidated cases were brought by respondents, all of whom are recipients of benefits under Title II of the Social Security Act of 1935, challenging the procedures used by the Social Security Administra-

tion (hereinafter the "Secretary") to recoup[1] overpayments. Respondents' challenges were based on the grounds that these procedures violate § 204(b) of the Social Security Act and the due process clause of the fifth amendment insofar as they do not provide an opportunity for a pre-recoupment oral hearing to determine whether recoupment of the overpayments should be waived.

It is important to note at the outset that this case is significantly different from the one which was before the court of appeals in two important respects. On the one hand, in his Opening Brief (hereinafter cited as Op. Br.) the Secretary reveals new recoupment procedures, effective January, 1979, which he claims materially alter the balancing of the respective interests in this case for purposes of determining whether a pre-recoupment oral hearing is constitutionally required. This action by the Secretary to change the Claims Manual procedure regarding recoupment is consistent with his revisions of the Claims Manual throughout this litigation in an effort to meet the concerns of the district and appellate courts in this case. Despite these changes, the Secretary still does not provide the necessary opportunity for a pre-recoupment oral hearing although he now claims that his most recent changes to his recoupment procedures are important. While an evaluation of these new procedures shows that the Secretary is still not providing an opportunity for a pre-recoupment oral hearing as required by the lower courts and also

[1] The term "recoup" means to suspend or reduce current benefits to secure repayment of the alleged past overpayment. The period of the suspension and the amount of reduction are unilaterally determined by the Secretary.

shows that the Secretary's claims about these new procedures are substantially exaggerated, it is essential for this Court to recognize that these new procedures have never been reviewed by any of the lower courts. If these new procedures do change significantly the recoupment system, then undoubtedly the proper forum for the Secretary to litigate that issue is in the respective district courts, not *de novo* in this Court. If these procedures do not alter substantially the recoupment procedures found to be illegal by all the lower courts, then it is improper for the Secretary to suggest to this Court that the changes are material and this Court should ignore these changes. For these reasons, respondents have filed a motion to dismiss or remand with this Court to allow the district court to determine the impact, if any, of these procedures.

On the other hand, the Secretary has abandoned his contention that his notice procedures and notice forms, which are an integral part of the recoupment process for every social security recipient, are valid. Understandably, the Secretary did not seek review by this Court of the court of appeals' ruling that his notice procedures and forms did not meet even the minimal requirements of proper notice under the due process clause of the fifth amendment. Therefore, that issue is not before this Court.[2]

[2] Repeatedly in his brief the Secretary attempts to enhance his argument that his recoupment procedures are constitutionally acceptable by describing the challenged scheme and making factual representations about respondents to demonstrate the fundamental fairness and efficiency of these recoupment procedures. However, the Secretary's factual representations must be carefully scrutinized since he failed to adequately inform respondents of their rights. Consequently, this Court should rely solely on

At the heart of the controversy before this Court is the correctness of the court of appeals' decision which requires the Secretary, consistent with § 204(b) of the Social Security Act and the fifth amendment to the United States Constitution, to provide an opportunity for a pre-recoupment hearing to recipients who seek to assert their statutory right to waiver of the overpayment. In 1939, Congress enacted § 204(b) of the Social Security Act, 42 U.S.C. § 402(b). It requires that:

> In any case in which more than the correct amount of payments has been made, *there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.* (Emphasis added.)

Consistent with this statutory mandate, the Secretary has promulgated detailed regulations which define the key statutory terms such as "without fault, "against equity and good conscience, and what is "contrary to purposes of Title II." Congress expressly prohibited the Secretary from recouping overpayment from recipients unless he determined their eligibility for waiver. As reflected in the Secretary's regulations, § 204(b) requires an in-depth, highly-individualized assessment of a recipient's state of mind and financial situation *prior to* the reduction or suspension of the recipients benefits in order to recoup any overpayment.

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the factual findings of the lower courts and not on the Secretary's representations about either the individual respondents or the recoupment procedures.

Under the Secretary's challenged recoupment procedures he makes an initial, *ex parte* determination that the recipient was overpaid. The recipient is then generally given a vague notice of his/her right to challenge the existence of the overpayment (*i.e.*, to request reconsideration) or ask that that debt be forgiven (*i.e.*, to seek waiver under § 204(b)). However, the initial recoupment letters sent by the Secretary to the recipients make no specific mention of the recipients' rights to reconsideration or waiver, nor do they set forth meaningful information about how to contest the overpayment. 564 F.2d 1219, 1235-36. The recipient obtains review of his/her case only by sending a letter or completing the appropriate form stating his/her reasons for opposing the overpayment determination or seeking waiver.[3]

It is the Secretary's stated policy to postpone temporarily recoupment action upon receipt of a request for reconsideration and/or waiver. Nevertheless, in many instances the recoupment action is not halted by the Secretary's receipt of a request for reconsideration or waiver. *See e.g.*, *Elliott* v. *Weinberger*, 371 F. Supp. 960, 966 n. 14 (D. Haw. 1974). In any event,

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[3] Contrary to the Secretary's claims that his employees assist recipients in seeking waiver and that recipients would be assisted in completing the appropriate forms to halt the proposed recoupment (Op. Br. at 4-5), the court of appeals specifically found that although all the named respondents had timely contacted the local social security office their next check, if recieved at all, was received in the reduced amount. Moreover, the court affirmed the *Elliott* district court's finding of fact that the "appropriate" forms required by the Secretary for the recoupment to assert his/her right to reconsideration and/or waiver were not readily available. *Elliott*, 564 F.2d at 1224, affirming 371 F.Supp. 960, 966, n. 14.

deferral of recoupment beyond 30 days after the date of the initial notice lies entirely within the discretion of the Secretary. *See* Claims Manual Section 5503.

Additionally, the only review available to the recipient who requests waiver, which requires an in-depth factual evaluation of fault, need, and detrimental reliance, is the Secretary's review of the information contained in the reconsideration and/or waiver forms or in any letter or other written document which is submitted to him by the recipient. Solely on the basis of that information, and without any effort to assess the recipient's credibility, the Secretary reviews the initial overpayment determination and determines whether the recipient is at fault and whether the recoupment would cause a financial hardship *i.e.*, whether waiver is appropriate. This review is not conducted by the recipient's local social security office; rather it is entirely in the control and discretion of one of the seven (7) regional Social Security Program Centers. The recipient is then notified of the decision and, if adverse, the Secretary immediately resumes the withholding of benefits to satisfy the overpayment. If the recipient is dissatisfied with this decision he/she may then request a *de novo* administrative hearing at which the recipient is provided his/her first opportunity to present oral testimony and to cross-examine witnesses before an independent hearing examiner. Recoupment, however, is not suspended pending the outcome of this *de novo* hearing and that hearing usually does not occur until many months after the initial waiver request.[4]

[4] In addition to this belated *de novo* hearing, should the hearings examiner affirm the Secretary's determination, the recipient can appeal to the Appeals Council of the Social Security Administration and eventually, if necessary, for judicial review of the Appeals Council's decision to district court.

To summarize, the Secretary's recoupment procedures found to be illegal by all the courts below are as follows:

(1) The Secretary makes an *ex parte* overpayment decision and so informs the recipient; however, he makes no initial decision regarding waiver of that overpayment;

(2) the recipient has 30 days in which to request review of that decision. This reconsideration could include both a redetermination of whether there was an overpayment and a decision as to whether recovery should be waived pursuant to § 204(b);

(3) during this short 30-day tolling period, the recipient may submit only written information which either contests the overpayment determination or supports a request for waiver of recoupment of the overpayment. This information is gathered by a local office of the Social Security Administration and is then forwarded to one of the seven (7) regional program centers where the *ex parte* waiver decision is made;

(4) reduction or suspension of the recipient's social security benefits should be tolled (but for all the named respondents recoupment was not tolled) during this initial reconsideration/waiver process; and

(5) solely on this paper review, the Secretary initially decides the waiver question.

All the respondents in this case are recipients of either old age, disability, or survivor's benefits under

Title II of the Social Security Act. All of them received the form notices from the Secretary announcing his *ex parte* determination of an overpayment. All of them timely contacted the local Social Security office, *i.e.*, within 30 days from receipt of the notice of overpayment, for the purposes of both contesting these overpayment decisions and, more importantly, to assert their statutory rights to waiver. In all cases, respondents' efforts to contest the overpayment and seek waiver were insufficient to halt the recoupment action proposed by the Secretary, despite the Secretary's oft-repeated assurances that requests for review halt recoupment. *Elliott*, 564 F.2d at 1228.

The three courts below ruled that the Secretary's recoupment procedures violate the due process clause of the fifth amendment of the United States Constitution insofar as they fail to provide pre-recoupment oral hearings on the creditability-based, highly individualized factual issues involved in the waiver determination. The court of appeals ordered the Secretary to provide the opportunity for such pre-recoupment oral hearings to the limited group of recipients like respondents, that Congress intended to protect by enacting the waiver provisions of Section 204(b) of the Social Security Act.[5]

SUMMARY OF ARGUMENT

The court of appeals properly balanced the competing governmental and private interests at stake, in

[5] Indeed, this conclusion was the one reached by the Court of Appeals for the Third Circuit in *Mattern* v. *Califano*, 582 F.2d 248 (3d Cir. 1978) petition for certiorari pending *sub nom Califano* v. *Mattern*, No. 78-699.

light of the mandatory waiver provision of § 204(b), and concluded that the due process clause required the Secretary to provide an opportunity for a pre-recoupment oral, evidentiary hearing regarding the recipient's eligibility for waiver of an overpayment. This conclusion is unavoidable for several reasons. First, it is required by the clear wording of Section 204(b), its legislative history and this Court's decision in *California Department of Human Resources* v. *Java*, 402 U.S. 121 (1970). Secondly, it is clear that the authoritative teachings of this Court, beginning with the decision in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) and culminating in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), dictate that an opportunity for a pre-recoupment oral hearing is necessary. Despite the highly individualized, subjective nature of the waiver inquiry, the Secretary's challenged procedures utterly fail to address either the problems inherent in making the difficult factual inquiries in the waiver decision of the difficulties resulting from the varying abilities of the elderly and often infirm recipients to address such issues through *ex parte* written submissions. Moreover, there are substantial administrative gains, in terms of the accuracy of the waiver determination process, in providing pre-recoupment oral hearings which greatly outweigh the insignificant costs the Secretary estimates. Finally, such pre-recoupment oral hearings are appropriate in light of the numerous similarities, in terms of the private interests at stake, between these social security recipients and the welfare recipients in *Goldberg* v. *Kelly, supra*.

Regarding the jurisdictional issues, the district courts properly exercised subject matter jurisdiction in these cases because 28 U.S.C. § 1361 authorizes federal courts to halt illegal conduct by federal offi-

cials where those officials owe a duty, either by operation of the constitution or statute, to the plaintiffs. Since respondents alleged that the Secretary's conduct in failing to provide them with the opportunity for a pre-recoupment oral hearing violated the fifth amendment and Section 204 of the Social Security Act, they met all necessary requirements for mandamus jurisdiction under § 1361. Moreover, it is clear that the district courts could grant full relief to the respondents and their class under § 205(g) of the Social Security Act. The Secretary's position that § 205(g) of the Social Security Act prohibits 1361 jurisdiction if accepted, would serve to bar as an unwarranted bar to social security recipients seeking judicial review of unconstitutional and illegal practices of the Social Security Administration. In effect the Secretary ignores § 1361 and seeks to insulate himself from meaningful judicial scrutiny. Equally unpersuasive is the Secretary's claim that class-wide relief is inappropriate under § 205(g). Therefore, it was proper for the district courts to exercise jurisdiction under § 205(g) and to grant injunctive relief to the class.

I.

UNDER EITHER § 204(b) OR THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT THE SECRETARY IS REQUIRED TO PROVIDE THE OPPORTUNITY FOR PRE-RECOUPMENT ORAL HEARINGS

A. Section 204(b) Itself Requires A Pre-recoupment Oral Hearing For All Waiver Cases

While the court of appeals based its decision on the due process clause, it is evident that § 204(b), by its own terms, requires an opportunity for a pre-recoupment oral hearing. This Court has repeatedly stated that if an interpretation of a statute would avoid the need to resolve a constitutional challenge, then it is the reviewing court's duty to scrutinize closely the statutory claim and attempt to reach an interpretation of it that would avoid the constitutional issue. *Fusari* v. *Steinberg*, 419 U.S. 379, 388, n. 13 (1975); *See e.g. California Department of Human Resources* v. *Java*, 402 U.S. 121, 124 (1971); *Dandridge* v. *Williams*, 397, U.S. 471, 475-476 (1970); *Rosado* v. *Wyman*, 397 U.S. 397, 402 (1970). The most pertinent example of the importance this Court places on this tenet of constitutional construction is its disposition of *California Department of Human Resource* v. *Java*, *supra*. In *Java*, plaintiffs challenged the procedures employed by California state officials under the California Unemployment Compensation Program which required an automatic suspension of benefits to an unemployed worker, who had been previously determined eligible, upon the employer's appeal of that eligibility determination. Payment of the worker's unemployment benefits would resume only if he prevailed at a second hearing. If he prevailed he would be paid retroactive compensation for any benefits lost. Plaintiffs argued that this automatic suspension provision violated both the due process clause of the fourteenth amendment to the United States Constitution and the "when due" language of § 303(a)(1) of the Social Security Act.[6] The district court ruled that

[6] Section 303(a)(1) of the Social Security Act, 42 USC § 503(a)(1), provides in part:

> (a) The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such

California's automatic suspension procedure violated this Court's interpretation of the fourteenth amendment in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) and that it also contravened § 303(a)(1). On appeal, this Court unanimously affirmed the district court's judgment and stated that

> We agree with the conclusion of the District Court that § 1355 of the California Unemployment Insurance does conflict with the requirements of § 303(a)(1) of the Social Security Act. This holding makes it unnecessary to reach the constitutional issue involved in *Goldberg* v. *Kelly, supra*, on which the District Court relied.

402 U.S. 121, 124. This ruling was reached after this Court thoroughly analyzed the applicable provision of the Social Security Act including a complete review of Congress' intent in enacting § 303. From this analysis and review, this Court determined that

> . . .the word "due" in § 303(a)(1), when read in light of the purposes of the Act means the time when payments are first administratively allowed as a result of a hearing of which both parties have notice and are permitted to present

State, approved by the Secretary of Labor under the Federal Unemployment Tax Act, includes provisions for—

(1) Such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due.

> their respective positions; any other construction would fail to meet the objective of early substitute compensation during unemployment. Paying compensation to an unemployed worker promptly after an initial determination of eligibility accomplishes the congressional purposes of avoiding resort to welfare and stabilizing consumer demands; delaying compensation until months have elapsed defeats these purposes.

402 U.S. 121, 133.

Like *Java*, in the case at bar respondents' challenge to the validity of the Secretary's recoupment procedures can be resolved without the necessity of reaching the constitutional issue. By the plain language of § 204(b) Congress has unequivocally vested in social security recipients the right to a pre-recoupment waiver decision in which the Secretary must show that the recipient was at fault in receiving or retaining the overpayment or that recovery of the overpayment would not otherwise be contrary to the remedial purposes of the Social Security Act. The exact language used by Congress in § 204(b) is extremely important and is, inexplicably, ignored completely by the Secretary in his brief. That section provides that "*there shall be no* adjustment . . . or recovery by the United States . . ." (Emphasis added.) *Congress* has determined that social security recipients are vested with their right to uninterrupted receipt of their monthly benefits until *after* the requisite factual findings regarding waiver are made by the Secretary. Thus, there can be no question that Congress mandated ("there *shall* be no . . .") that social security recipients were entitled, as a statutory right, to a pre-recoupment

waiver decision. By placing the initial burden on the Secretary to determine waiver *prior to* recoupment, Congress determined that the Secretary was to engage in a very exacting inquiry in order to establish whether the recipient was at fault or whether recoupment would cause a financial hardship and be contrary to the purpose of Title II.[7]

[7] The limited legislative history of § 204(b) is entirely consistent with the foregoing interpretation of the entitlement which Congress intended to vest in social security recipients who are overpaid. Originally enacted in 1939, § 204(b) was intended to be a complete waiver by the United States of any right to recover overpaid monies from social security recipients who were not "at fault" in causing or retaining the overpayment or who could repay the overpayment. *See Hearings Relative to the Social Security Act Amendments of 1939 before the House Committee on Wage and Means*, 76th Cong., 1st Sess. (1939); H.R. Doc. No. 110, 76th Cong., 1st Sess. (1939). In its deliberations regarding the proposed § 204(b), Congress expressed its concern that it be clear to the Secretary that he should assess individually the fault and hardship of each recipient. *See Hearings on H.R. 6635 before the House Committee on Ways and Means*, 76th Cong., 1st Sess. 2287-2289 (1939). Subsequent to its enactment in 1939, § 204(b) has been specifically reviewed by Congress when it was considering amending those sections of the Social Security Act which govern overpayments and underpayments. This review occurred in 1968 *after* the Secretary's administration of § 204(b) had been evaluated by the Comptroller General and that evaluation was submitted to Congress as *The Report to the Congress of the United States, Review of Certain Aspects of Social Security Benefit Overpayments* (March 1967). Even in the face of the Comptroller's report which estimated that for fiscal year 1965 waivers under § 204(b) cost the Secretary over $14,000,000, Congress, in considering amendments to § 204(b), did not enact any legislation which undermined the mandatory language of § 204(b) passed in 1939.

In the face of the clear statutory language and mandate of § 204(b), the Secretary wrongly contends that his present, written submissions procedure is consistent with § 204(b). However, not only does this position ignore the clear command of § 204(b), it also overlooks his own regulations. In order for him to determine "fault" he must evaluate "all pertinent circumstances, including his age, intelligence, education, physical and mental condition." 20 C.F.R. § 404.507.[8]

[8] These critical sections of the Secretary's regulations on "fault" and "hardship" provide as follows:

§ 404.507 Fault.

'Fault' as used in 'without fault' (*See* §§ 404.506 and 405.355) applied only to the individual. Although the Administration may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Administration seeks to recover the overpayment from liability for repayment if such individual is not without fault. In determining whether an individual is at fault, the Administration will consider all pertinent circumstances, including his age, intelligence, education, and physical and mental condition. What constitutes fault (except for 'deduction overpayments'—*See* § 404.510) on the part of the overpaid individual or on the part of any other individual from whom the Administration seeks to recover the overpayment depends upon whether the facts show that the incorrect payment to the individual or to a provider of services or other person, or an incorrect payment made under Section 1814() of the Act resulted from:

(a) An incorrect statement made by the individual which he knew or should have known to be incorrect; or

(b) Failure to furnish information which he knew or should have known to be material; or

(c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been

Moreover, 20 C.F.R. §§ 404.510-511 require him to evaluate the state of mind of the social security recipient to determine whether there has been reasonable belief, unjustified reliance, unawareness, lack of knowledge or failure to understand applicable law. Finally, 20 C.F.R. § 404.511 requires the Secretary to determine whether the recipient acted in good faith and used a high degree of care in order to decide the fault prerequisite of § 204(b). The Secretary's practice of recouping overpayments without first affording a recipient an opportunity for an oral hearing at which these highly individualized issues of fact can be decided surely cannot be justified in light of the clear prohibition against summary recoupment found in § 204(b).

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expected to know was incorrect. [34 F.R. 14888, Sept. 27, 1969; 34 F.R. 15646, Oct. 9, 1969]

§ 404.508 Defeat the purpose of Title II.

(a) General. 'Defeat the purpose of Title II,' for purposes of this subpart, means defeat the purpose of benefits under this Title, *i.e.*, to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. An individual's ordinary and necessary expenses include:

(1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (*e.g.*, life, accident, and health insurance including permiums for supplementary medical insurance benefits under Title XVIII), taxes, installment payments, etc.;

(2) Medical, hospitalization, and other similar expenses;

(3) Expenses for the support of others for whom the individual is legally responsible; and

(4) Other miscellaneous expenses which may reasonable be considered as part of the individual's standard of living.

In light of § 204(b) and its implementing regulations and their analytical similarity to those reviewed in *Java*, this Court's disposition of *Java* is particularly compelling in this case. Like the plaintiffs in *Jave*, respondents will be provided with a full opportunity to present oral evidence on their statutory eligibility only *after* rather than *before* their benefits have been suspended or substantially reduced. Also, the eligibility determination in *Java* and the one in this case are strikingly similar—both are extremely individualized, highly fact-intensive inquiries, *i.e.*, whether, *inter alia*, the unemployed worker and left his last job with "good cause", and whether, *inter alia*, the social security recipient is "at fault" in causing or retaining the overpayment. Both in *Jave* and the instant case, program beneficiaries are entitled to an opportunity for an oral hearing to establish their respective statutory eligibilities *before* the administrative agency acts to terminate or suspend their benefits. Additionally, because of the mandatory nature of § 303 (as

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(b) *When adjustment or recovery will defeat the purpose of Title II.* Adjustment or recovery will defeat the purposes of Title II in (but is not limited to) situations where the person from whom recovery is sought needs substantially all of his current income (including social security monthly benefits) to meet current ordinary and necessary living expenses. [32 F.R. 18026, Dec. 16, 1967, as amended at 34 F.R. 14888, Sept. 27, 1969]

'Against equity and good conscience' means that adjustment or recovery of an incorrect payment (under Title II or Title XVIII) will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right (examples (1) and (4) or changed his position for the worse (examples (2) and (3)). In reaching such a determination, the individual's financial circumstances are irrelevant.

interpreted by this Court in *Java*) and § 204(b), the initial burden is on the administrative agency to present by reliable and credible evidence reasons why the worker's or recipient's benefits should be terminated or suspended. Finally, like § 303(a)(1) interpreted in *Java*, § 204(b) is an integral part of the Social Security Act with its attendant remedial purposes.

As the court of appeals properly recognized, the facts of Respondent Biner's case graphically illustrate that the Secretary's regulations cannot be administrated without a pre-recoupment oral hearing. While the Secretary can determine that Mrs. Biner may have been overpaid in 1972, it is impossible for him to gauge Mrs. Biner's state of mind and credibility without an opportunity for an oral pre-recoupment hearing. Without affording Mrs. Biner the opportunity for such a hearing, the Secretary decided that Mrs. Biner was "at fault" and therefore not entitled to waiver. However, as the court observed, whether Mrs. Biner knew or should have known or could have known she was not entitled to those checks seems to be a matter incapable of resolution without a hearing to hear her side of the story. Finding fault on the basis of the content of an ambiguous form letter enclosed with the first overpayment check, without giving Mrs. Biner an opportunity to explain in person what she thought it meant, flies in the face of the statutory waiver requirement of § 204(b). 564 F.2d at 1233.[9]

[9] The fact that Ms. Biner was ultimately found at fault has no bearing on whether she was entitled to a prior oral hearing, for as the court of appeals noted:

> The decisionmaker has to hear the claimant's story and perception of the facts in order to determine whether he "should have known." To say that the decisionmaker need not hold a hearing, just because in some cases claimants will fail to meet their burden after testimony, is absurd. *Elliott*, 564 F.2d at 1233, n. 19.

In light of the unequivocal mandate of § 204(b), it is clear that the only fair means for the Secretary to assess and evaluate the recipient's eligibility for waiver is for him to provide the opportunity for pre-recoupment oral hearings on this narrow, yet crucial, issue. By failing to do so and implementing a system of *ex parte*, written submissions, the Secretary has disregarded the specific congressional requirements of § 204(b).

B. The Due Process Clause Of The Fifth Amendment Requires The Secretary To Provide The Opportunity For Pre-recoupment Oral Hearings

The court of appeals, after thoroughly examining the Secretary's recoupment procedures, concluded that those procedures were unreliable, unfair, and unconstitutional. In so deciding, the court of appeals was careful to limit its ruling to only those social security recipients that Congress clearly intended to protect by enacting § 204 of the Social Security Act.[10]

[10] The court of appeals ruled that for a very few recipients who merely contest the Secretary's decision that there has been an overpayment and who raise credibility issues, due process requires the Secretary to provide them with an opportunity for a pre-recoupment oral hearing. The Secretary does not raise this decision as a question for review by this court. While he does address this ruling by claiming that it somehow compels him to provide pre-recoupment hearings to *all* recipients seeking only reconsideration, that contention is surely incorrect. It is clearly the Secretary's choice to expand the scope of the court's ruling. In any event, that portion of the court of appeals decision concerning the reconsideration cases is not before this Court.

Contrary to the Secretary's assertion, the court of appeals did not misinterpret prior rulings of this Court; it merely properly applied those prior decisions to this unique statutory scheme.

The Secretary argues that the decision of the court of appeals is inconsistent with the analysis of this Court in *Eldridge*, 424 U.S. 319 (1976). That contention is patently wrong. In *Eldridge*, this Court ruled that the Secretary's procedures for terminating disability benefits under Title II of the Social Security Act were constitutionally valid even though the Secretary did not provide for an oral pretermination hearing. In so ruling, this Court articulated the three factors which must be considered in analyzing the dictates of due process—they are:

> . . . first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

424 U.S. at 335. After analyzing the Secretary's procedures in light of these factors, this Court determined that those procedures were minimally acceptable because of their "very elaborate" character; the "routine, standard, and unbiased" nature of the reports on which the termination decision was based; and the demonstrated significant governmental burden to provide pretermination disability hearings. Adhering strictly to this three-prong *Edridge* analysis,

the court of appeals here properly balanced the competing governmental and private interests and determined that the Secretary's recoupment procedures were unconstitutional.

1. The Private Interest At Stake Here Is Significant.

Regarding the private interest at stake, the court of appeals correctly rejected the same contentions that the Secretary asserts in his brief, *i.e.*, that the private interest here is not as significant as that in *Eldridge*. He bases his argument not on the regulations and procedures which were reviewed by the court of appeals, but rather he focuses on what he contends are *new* procedures which became effective in January, 1979. As discussed at pp. 20-22, *supra*, notwithstanding these new procedures, the Secretary continues to ignore the clear, mandatory provisions of § 204(b) in analyzing the private interests in this case. In § 204(b), Congress specifically articulated that "there shall be no adjustment . . . or recovery by the United States from any person who is without fault. . .". By so doing, Congress legislated a statutory entitlement to continued uninterrupted receipt of social security benefits for social security recipients who meet the conditions of waiver.

The character of the private interest in the case at bar is also defined by the Secretary's own regulations implemented to comply with the mandate of § 204(b). Those regulations require the Secretary, in making the decision whether to waive overpayment, to weigh very subjective, highly individualized factors such as the recipient's age, intelligence, education and physical and mental condition, in addition to "all [other]

pertinent circumstances," 20 C.F.R. § 404.507. Additionally, these regulations require an inquiry into the recipient's financial situation, *i.e.* his/her ability to repay the overpayment, 20 C.F.R. § 404.508. Thus, unlike the private interest at issue in *Eldridge*, both Congress and the Secretary have expressed strong opinions that social security recipients are vested with the right to keep overpaid monies unless, after a highly subjective inquiry, the Secretary can find he/she was "at fault" or recovery would not be inequitable or defeat the remedial purpose of the Social Security Act.

In the face of the respondents' statutorily-based private interest, the Secretary argues that the court of appeals wrongly found that the "strength of the private interest of [respondents] lies between *Eldridge* and *Goldberg*." 564 F.2d. 1219, 1231. The Secretary's position is that his practice of regularly "suspending" benefits for between one month and one year did not actually constitute a "termination" but was a "temporary reduction in benefits." Op. Br. at 33. Obviously, the Secretary's labels are of no value for they disregard the cruel fact, found by all the courts below, that regardless of what the Secretary called his action, he regularly stopped all monies being paid to respondents and this stoppage continued for several months for each respondent. *See Elliott*, 371 F. Supp. at 966, n. 14. In an effort to strengthen his argument regarding the private interest at stake here, the Secretary claims that these "temporary reducations in benefits" are acceptable in this case because "elderly or disabled recipients are generally eligible for Supplementary Security Income (SSI) welfare benefits under Title XVI of the Social Security Act, 42 U.S.C. 1381 *et seq.*" Op. Br. at 33-34. This statement grossly exag-

gerates the availability of SSI to Title II recipients. On the one hand, in most states, the monthly SSI payments are set far below the level of the recipient's monthly Title II payment. For example, the plight of Mr. Jordan Silva is illustrative of this situation. Because he worked for over forty years, Mr. Silva is entitled to a monthly Title II benefit of approximately $240.00. If he were found eligible for SSI, his benefits would only be approximately $200.00 per month. He would immediately lose more than 15% of his income.[11] This is a significant loss for recipients who the Secretary acknowledges ". . . depend [on Title II benefits] for the necessities of life." Claims Manual Section 5000; *Elliott* v. *Weinberger*, 371 F. Supp. 960, 967, n. 17. On the other hand there is no question that there is substantial delay in respondents' obtaining any SSI assistance for there is an unlimited initial period in which the SSI officials are permitted to determine an applicant's eligibility and substantial delay periods have been common nationwide. *See* Amicus Curiae Brief filed by the Gray Panthers, at pp. 14-20. Consequently, during this long period, Mr. Silva would have no income from which to pay for food, shelter, and the other essentials of life. Furthermore, if Mr. Silva were ineligible for SSI, and eligible for the limited state funded welfare assistance in Hawaii (general relief), at a maximum, he would receive only $145.00 per month or less than 60% of his Title II check. *See Id.*

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[11] These figures are based on Mr. Silva's current Title II benefits and the present SSI payment for a one person household in Hawaii. If Mr. Silva were forced to apply for and receive State funded general assistance in Hawaii his monthly benefit would be only $141.00 or a loss of almost 40% of his income. *See* Amicus Curiae Brief for the Gray Panthers, at pp. 14-20.

Not only does the Secretary misleadingly argue that these alternative sources of income are readily available, he also incorrectly claims that "there is significant possibility that Social Security recipients will have personal income or resources other than their insurance payments. . .", Op. Br. at 34, and therefore social security recipients in this case have less of a private interest in pre-recoupment oral hearings than did the welfare recipients in *Goldberg*. What the Secretary conveniently fails to tell the Court is that under the Aid to Families with Dependent Children Program (AFDC), 42 U.S.C. § 601, *et seq* (1978), which was the sole source of the recipients' income in *Goldberg*, virtually all states permit welfare recipients to retain liquid assets and other resources and still be fully eligible for AFDC benefits. *See* 45 C.F.R. § 233.20(a)(3) (1977). Moreover, Congress has mandated that certain earnings are to be disregarded in determining the amount of AFDC asistance for working recipients, 42 U.S.C. §§ 602(a)(7), (8) (1978); therefore this significantly large group of AFDC recipients have substantial non-welfare income or resources, yet this Court in *Goldberg*, and again in *Eldridge*, found their private interest sufficient to require a per-termination oral hearing.[12]

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[12] For example, under the AFDC program all recipients may be permitted, depending on the applicable state regulations, to retain up to $2,000 in cash reserves and own an automobile and other liquid assets. *See* 45 C.F.R. § 233.20(a)(3) (1977). Additionally, for working AFDC recipients, because of certain income disregards (*See* 42 U.S.C. § 602(a)(8)), they are able to retain on a monthly basis substantial funds in excess of a state's standard of financial need. This earned income disregard is in addition to reimbursement the recipient receives for all reasonable work expenses. *See generally Shea* v. *Vialpondo*, 416 U.S. 251 (1974). A

Understandably the Secretary ignores these important similarities in the AFDC and Title II programs and he focuses solely on his claim that Title II is not "need based" and that therefore this Court's analysis in *Eldridge* of the private interest involved in *Goldberg* is irrelevant to this case. However, in the instant case, like the compelling financial need in *Goldberg*, financial need is central to the waiver question and to the issue of continued eligibility for either retirement or survivor's benefits. Need is a key factor in *every* waiver request under the Secretary's regulations, because pursuant to 20 C.F.R. § 404.508, the Secretary must decide if the recipient has sufficient income and resources "required for ordinary living expenses." This decision is governed by recipient's dependency "upon all of [the recipient's] current benefits for such needs, that is, an indepth evaluation of the recipient's

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typical AFDC budget for a working recipient with three dependents in Hawaii, for example, would be:

Gross Wages	$500.00
Less Payroll Deductions	35.00
Balance	$465.00
Less Work Expenses	40.00
Balance	$425.00
Less 42 U.S.C. § 602(a)(8) Disregard	161.33
Balance	$263.67

The Hawaii state standard of assistance for this family is $546.00; therefore, the AFDC payment to this family would be $285.33 ($546.00 minus $263.67). Consequently, this family would have approximately $748.33 per month in disposable cash, or approximately $198.33 more than the state standard of assistance. *See* Hawaii Revised Statutes §§ 346-29, 53, 55, (1978); Hawaii Public Welfare Manual §§ 3367, 3368 (1978).

'fixed living expenses' such as food and clothing, his/her 'medical' expenses and 'other miscellaneous expenses which may reasonably be considered as part of the individual's standard of living'." 20 C.F.R. § 404.508(a)(1), (2), and (4)" Furthermore, as the court of appeals found, retired social security recipients are "taxed" for each dollar they earn above the statutory maximum. This "tax," the appellate court found, was very "similar to that found in many welfare programs," *See* generally 42 U.S.C. §§ 602(a)(7) and (8) (1978). In establishing financial need as an essential inquiry in the waiver determination under § 204 and an important factor in continued eligibility of retirees and survivors, Congress treated respondents more like the welfare recipients in Goldberg rather than the beneficiaries of the pure insurance program at issue in *Eldridge*. From the preceeding analysis it is obvious that Title II is an income maintenance program like AFDC and that for purposes of the nature of the private interest at stake in determining need for a pre-recoupment oral hearing, these programs are analogous.[13]

After six and one half years litigation in this case, the Secretary for the first time in his Opening Brief reveals what he asserts are new Claims Manual provisions which will "liberalize previous practices. . ."

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[13] Of the plight of such persons directly subjected to the Secretary's recoupment procedures, the district court stated that these recipients were in "brutal need" in the *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) sense because:

> Starvation may be slower if benefits are reduced or suspended rather than terminated in *Goldberg*, but some recipients will suffer nonetheless. 371 F. Supp. at 970.

Op. Br. at 33. The Secretary attempts to portray to this Court that the procedure under this new system, never reviewed by any of the courts below, is as follows:

> Under the new Claims Manual provisions that will become effective in January 1979 (App., *infra.*), recoupment generally will not require more than a 25 percent reduction in monthly benefits unless the overpayment was obtained by fraud or the beneficiary still has the overpaid amount in his possession. *In the absence of fraud or retention of the overpayment, the Social Security Administration will no longer propose temporary interruption of monthly benefits.* Op. Br. at 31. (Emphasis added.)

Consequently, at pages 31-33 of this brief, the Secretary vigorously contends that these regulations substantially alter the private interest which the recipient has at stake in obtaining a pre-recoupment oral hearing under this Court's decision in *Matthews* v. *Eldridge*, 424 U.S. 319 (1976). Unquestionably, since the Secretary premises his entire legal argument regarding the private interest here on these new procedures and he does not address the recoupment procedures invalidated by the court of appeals, there has been a drastic change in position by the Secretary. Whereas before the court of appeals the Secretary argued, *inter alia*, that his current recoupment procedures were valid even though it was his practice to suspend indefinitely respondents' entire monthly check, now, because of these new procedures, he contends there is no deprivation, only a temporary, limited reduction of

the recipient's property interest. By this maneuver, the Secretary is attempting to have this Court validate a system which he concedes may be substantially different from the one before the lower courts. This he cannot do for it is the settled law of this Court that it will not be misled into issuing advisory opinions. *EPA* v. *Brown*, 431 U.S. 99, 103-104 (1977); *Fusari* v. *Steinberg*, 419 U.S. 379, 387-388 (1975); *Richardson* v. *Wright*, 405 U.S. 208, 209 (1972).

Moreover, a close reading of this new, untested procedure shows that it will not significantly change the Secretary's present practice to conform with the court of appeals' decision in this case. On its face the changes emphasized by the Secretary are minor. First, it is unquestionable that the Secretary has not provided for the opportunity for the pre-recoupment oral hearing required by the court of appeals. In lieu of complying with the appellate court decision, the Secretary has merely extended the situation in which he will grant what he terms as "partial adjustment," *i.e.*, a monthly withholding of up to 25% of the recipient's check. However, the criteria for determining who, under these new procedures, is entitled to partial adjustment are identical to the § 204(b) waiver standards, *i.e.*, fault and hardship. Apparently, partial adjustment will *not* be granted where the recipient is "at fault" or where full suspension of benefits would not cause a hardship. As discussed in more detail *infra* at 25-26, an evaluation of fault for any purpose under the Secretary's own procedures, *see* 20 C.F.R. § 404.507 and Claims Manual § 5540-5547.8 (See Appendix "A" attached hereto), requires an in-depth analysis of whether the recipient knew, should have known, or could have known that there had been an

overpayment.[14] It is precisely these difficult, highly subjective fault determinations which require an opportunity for a pre-recoupment oral hearing. Since the Secretary's new procedures necessitate the application of the same legal standards to very individualized factual situations, these new procedures certainly do not, in the Secretary's terms, "liberalize" the recoupment process in any significant manner.

Secondly, apparently these new procedures prohibit the Secretary from granting "partial adjustment" to recipients who assert their statutory rights to waiver. If this is an accurate interpretation of this new, untested Claims Manual procedure, then undoubtedly this procedure conflicts with § 204(b) and its requirement that the recipient is entitled to a waiver decision *before* losing his/her social security benefits. Finally, this partial adjustment scheme is entirely permissive—it is completely within the discretion of the Sec-

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[14] Indeed, Claims Manual § 5547.4 provides that:

(a) General

An overpaid person will not be found "without fault" if the evidence shows a lack of good faith or failure to exercise a high degree of care in determining whether an event that might cause deductions or terminations of entitlement should be reported.

(b) Degree of Care

A high degree of care is expected of a person. However, it may vary with the complexity of the circumstances giving rise to the overpayment and the capacity of the particular payee to realize that he is being overpaid. *Accordingly, variances in the personal circumstances and situations of individual payees are to be considered in determining the high degree of care expected of them.* (Emphasis added.)

retary when and to whom partial adjustment will be granted.

Not only is it clear that these new procedures recently disclosed by the Secretary do not reduce the significant private interest of respondents in a pre-recoupment oral hearing, it is also certain that by attempting to accommodate recipients whom he apparently intends to benefit by partial adjustments, the Secretary is acknowledging the great private interest involved in this case. Undoubtedly the Secretary is directing these partial adjustments to recipients whom the Secretary finds are not intentionally at fault but for whom full suspension would cause a hardship. By so doing, the Secretary properly recongizes that many social security recipients rely on their benefits as their only source of income and subsistence.

Consquently, these new procedures do not alter the significant deprivation of monthly social security benefits which does, and will still, result from the Secretary's ex parte recoupment procedures. The facts, as found by *all* of the courts below, and the secretary's practice belie the Secretary's claim that there is not a substantial deprivation. It is undisputed in the record that it is the Secretary's regular practice to suspend benefits entirely, and only later make "partial adjustments". *Elliott*, 371 F. Supp. at 966, n. 14. While the length of the period of suspension varies with the amount of the alleged overpayment and the recipient's monthly entitlement, there can be no question that these suspensions of benefits had devasting effects on social security recipients who depend on their benefits as their sole source of income. Thus, the court of appeals correctly decided that respondents'

private interests under § 204(b) are greater than those scrutinized n *Eldridge* and are like the private interests of welfare recipients in *Goldberg*.

2. The Risk Of Error Under The Secretary's Procedures Is Great And The Value Of An Oral Pre-recoupment Hearing Is Substantial.

The court of appeals also properly evaluated the risk of erroneous deprivations under the Secretary's challenged recoupment procedures and correctly determined that an opportunity for an oral pre-recoupment hearing was necessary in order to make proper waiver decisions. This conclusion is entirely in harmony with the *Eldridge* decision.

In *Eldridge*, this Court reviewed procedures in which the Secretary made an initial determination of continued disability *after* that determination had been previously reviewed by a separate state agency and based solely on reports which were "routine, standard, and unbiased." 424 U.S. at 344, quoting *Richardson* v. *Perales*, 402 U.S. 389, 404 (1971).[15] Here, the

[15] Indeed, it is evident that the Secretary's position regarding the objectivity of the disability determination process has changed several times. Just a few short years ago, in his brief to this Court in *Eldridge*, the Secretary repeatedly argued that evidence of disability is "uniformly recognized" to be reliable and "cross-examination is of limited value." Op. Br. at 41, 42. *Eldridge*, Op. Br. at pp. 12-13, 40-41, 42, 44. However, in this case, he now claims that the court of appeals "underestimated the role of creditability" in disability cases and that disability decisions "may well depend on subjective factors." The obvious inconsistency of these positions demonstrates the Secretary's willingness to represent inconsistent claims to this Court on different occasions about the same administrative scheme.

decision-making process and the information used in that process is significantly different. The Secretary makes an *ex parte* determination of an alleged overpayment but this is *not* the issue to be reviewed at a pre-recoupment hearing in waiver cases. Rather, at the hearing the recipient seeks an *initial* ruling on whether the overpayment should be waived pursuant to § 204(b). At the outset it is important to note that under the Secretary's written submission procedure the waiver decision is not made at one of the approximately 800 local district offices social security administration. Waiver is decided at one of the seven (7) regional offices, geographically far removed from the recipient, based solely on the written information submitted by the appropriate district office. This is important because there is certainly much less opportunity here for the recipient to "mold" his argument than there was in *Eldridge* where only routine medical reports were at issue. Also, unlike *Eldridge* where the beneficiary was involved in the decision-making process from the outset on the issue which was critical to the beneficiary, (*i.e.*, whether he/she was "disabled"), here the Secretary begins the recoupment process without the recipient's involvement and he only postpones that process for a short period to receive written information regarding the recipient's "fault" and "ability to repay."

Again unlike *Eldridge*, the waiver question requires the assessment of fundamentally different evidence and the application of highly subjective legal standards. In order to make a waiver determination, the decisionmaker must analyze and weigh the very individualized and personalized evidence which is determinative of whether a recipient is "at fault" in causing the overypayment and whether he/she is able to repay. The subjective nature of the inquiry is exemplified by the fact that under the Secretary's regulations, a recipient may still be at fault "even [though] the administration may have been at fault in making the overpayment," or if he/she "knew or could be expected to know" an overpayment would occur from his/her receipt of excess benefits. 20 C.F.R. § 404.507(c). These regulations state unequivocally that this fault determination must be based on *facts*. Included in the facts which are required to be considered by the Secretary is the recipient's "age, intelligence, education, and physical and mental condition." 20 C.F.R. § 404.507. As is evident from the Secretary's regulations, this fault decision is very fact-intensive and credibility-based and this decision can be made only by an oral pre-recoupment hearing.

For example, such a proceeding would have been invaluable for Mrs. Yamasaki since the Secretary had determined that she owed $207.90 and the stated reason was that it was due to the Secretary's "processing error." The only fair means for the Secretary to evaluate whether Mrs. Yamasaki "knew or should have known or could be expected to know," about the incorrect payment is through an oral hearing at which she is questioned and testifies. This conclusion is underscored by the fact that because the waiver decision is made at one of the seven regional offices, based solely on the written information submitted by one of the 800 local district offices, Mrs. Yamasaki is foreclosed from molding her argument to the interests of the decisionmaker. Moreover, it is evident from the highly subjective nature of the waiver inquiry that Mrs. Yamasaki and other lay witnesses would be tes-

tifying on the fault and hardship issues at the pre-recoupment hearing and that, unlike the expert evidence at issue in *Eldridge*, this testimony is virtually indistinguishable from that to be heard in *Goldberg*.

In his brief, the Secretary renews his argument that the determination of whether a recipient "knew or should have known or could be expected to know" that the retention or receipt of an overpayment was improper is an objective test. Op. Br. at 42. The court of appeals soundly, and properly, rejected the Secretary's contention that the fault decision is based on an objective test and that therefore no oral hearing is necessary. As the court of appeals explained:

> The decisionmaker has to hear the claimant's story in order to determine whether he "should have known," To say that he need not hold a hearing just because in some cases claimants will fail to meet their burden after testimony, is absurd. Since § 404.507 requires the reasonable person to be viewed in the claimant's own circumstances and with whatever mental and physical limitations the claimant might have, the claimant must be given an *effective* opportunity to communicate these characteristics to the decision-maker. The very test which might permit a decision on documentary evidence alone as a matter of administrative law, is itself dependent upon information which can effectively be adduced only at an oral hearing.

564 F.2d. 1219, 1233, n. 19. (Emphasis in original.)

All the courts below recognized the importance of providing social security recipients with a meaningful

opportunity to communicate with the decisionmaker and that the Secretary's written submission procedure was totally inadequate. This conclusion of the lower courts is premised, in part, on an accurate assessment of the capabilities of the social security recipients who are limited by the Secretary to written submissions for waiver decisions. As Judge King found in *Elliott*, a recipient only "nebulously" understands the Secretary-challenged procedures because

> [M]any of these claimants (seeking waiver) are elderly and disabled people whose capabilities may frustrate an effective presentation of their case.

Elliott v. *Weinberger*, 371 F. Supp. at 966. Indeed, the Secretary in his brief to this Court in the case of *Richardson* v. *Wright*, 405 U.S. 208, 216 (1972) (dissenting opinion of Justice Brennan) acknowledged that old-age recipients could not effectively employ a written submissions system. Therefore, this Court's admonition in *Goldberg* that written submissions were

> an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively

397 U.S. at 269, is equally applicable to the Secretary's recoupment procedures.

Similarly, once the thorny, creditability-based fault issue is resolved, the Secretary then must determine whether it would be "against equity and good conscience" or "defeat the purposes of (Title II)." This evaluation, as detailed by the Secretary's regulations,

20 C.F.R. §§ 404.508 and 404.509, requires an in-depth analysis primarily of the recipient's financial needs; the state of the recipient's knowledge about his entitlement to the overpayment monies; and a determination of whether the recipient detrimentally relied on receipt of the overpayment. Again, this is clearly the type of evidence which goes far beyond the "routine, standard" medical reports at issue in *Eldridge*. Because of these critical differences in the evidentiary and legal standards, the court of appeals properly ruled that the Secretary's recoupment procedures were illegal.

Another relevant factor under the *Eldridge* analysis is the relative reliability of the existing procedure. In assessing the value of statistics as a gauge of the reliability of a procedure in *Eldridge*, this Court stated that "statistics rarely provide a satisfactory measure of the fairness of the decision-making process." *Eldridge, supra*, at 346. A further caution is necessary since the Secretary belatedly offers statistics which were never presented to either the court of appeals or the district courts. Even if statistics are relevant, certainly the proper yardstick under *Eldridge* is *not* the reliability of the procedures *after* court-ordered changes have been made. Consequently, the Secretary's profferred statistics are an invalid measure of the relative reliability of his challenged procedures because those statistics are based on his experience under the improved, court-ordered procedures. Also, as previously discussed, *see* pp. 2-3, *supra*, these unsubstantiated statistics are not part of the record in this case and thus they must be disregarded. Moreover, as the court of appeals correctly observed, statistics, like those offered by the Secretary, are wholly irrelevant to determine the reliability of the court-

ordered procedures unless those statistics definitively show abuse by establishing a significant number of frivolous hearing requests. 564 F.2d. at 1234. Absent such a showing, which understandably the Secretary cannot make, statistics, like those belatedly disclosed by the Secretary, are of no value.

Before the court of appeals, the Secretary claimed, as he does here, that because there was a low "overall" number of recipients who had obtained successful relief, his procedures were reliable. Op. Br. at 47. However, the Secretary wrongly draws from the entire overpayment population and not from those who actually sought waiver. Since the Secretary makes no waiver determination until asked by the recipient and since § 204 grants the rights of waiver to *every* overpaid recipient, this distinction is crucial and it shows the unacceptably high error rate prior to the district court decisions in this case. That is, there is almost a 75% error in the pre-*Elliott* procedures[16] This is a far

[16] Specifically, Judge King, in *Elliott*, found that in 1970 (the latest figures available at that time) the reversal rate was over 73%. That is, of the estimated 12,000 requests for reconsideration and waiver, over 8,000 finally succeeded in obtaining full relief. 371 F. Supp. at 967. Also, in light of the actual findings by all of the lower courts, it is very likely that this group would be larger if the Secretary adequately informed recipients of their rights to waiver and reconsideration (the Secretary's form notice was found to be constitutionally invalid), and if the Secretary facilitated filing for reconsideration and waiver (recipients were not provided with waiver and reconsideration forms and even when submitted, they did not toll recoupment). Given the inadequacies of the Secretary's notice and the difficulties for recipients initiating the reconsideration/waiver process, these figures are very dramatic, for undoubtedly these failures of the system discouraged or thwarted many recipients from exercising their right to waiver.

more significant error rate than was presented in *Eldridge* where this Court found that disability termination procedures produced between a 3.3% and 56.8% error rate. 424 U.S. at 346 n. 19b. Also, the error rate in *Eldridge* was far more crucial because there the Secretary may have been paying *ineligible* persons during the hearing process. Such is not the case here because unlike *Eldridge* respondents' eligibility for their social security benefits is *never* at issue. In light of these statistics, it is evident that the Secretary's challenged procedures allowed him to reduce or suspended social security payments when, in view of Section 204(b), he absolutely has no right to do so. Nothing in *Eldridge* alters the conclusion that the Secretary's procedures are highly unreliable and it is only through pre-recoupment oral hearings that proper safeguards will be provided.

3. The Public Interest At Stake In Recoupment Decisions Compels The Secretary To Provide The Opportunity For A Pre-Recoupment Oral Hearing

The final factor in the *Eldridge* analysis is a balancing of the public interest at stake in recoupment decisions, including the governmental function involved and the fiscal burden that those additional safeguards entail. As discussed at p. 16 *supra*, by enacting the language of § 204(b) Congress strongly expressed the overriding public interest in protecting social security recipients' rights to uninterrupted benefits until *after* the Secretary has made a proper waiver decision. No such compelling public expression of the public's interest was present in *Eldridge*.

For several additional reasons, it is clear that it is in the public's interest for the Secretary to provide pre-recoupment oral hearings. First, there is no reason to assume that there would be a significant increase in the number of hearing requests, or that the Secretary has a strong fiscal interest in not providing pre-recoupment oral hearings. Indeed, since the issue in this case is the *timing* of the waiver hearing, not whether a hearing must be held, it cannot be argued seriously that there are any significant additional fiscal or governmental burdens imposed by requiring the Secretary to provide pre-recoupment oral hearings on waiver. The decision by the court of appeals only requires the Secretary to alter the timing of this hearing, not to provide hearings in situations where he had not been previously doing so. 564 F.2d, at 1235. Hence there is no question that the court of appeals' ruling would not cause *additional costs* by requiring that a hearing take place before, rather than, after recoupment.

Moreover, contrary to the Secretary's assertions, *see* Op. Br. 48-49, there is no threat of additional fiscal burden in this case because of the possibility recipients would file for the pre-recoupment hearing solely as a means of delaying recoupment. This is true for several reasons. On the one hand, there is absolutely no evidence in the record of this case to support the Secretary's contention that the court of appeals' decision will result in increased hearing requests. *See* Op. Br. at 49-50. Rejecting this claim by the Secretary, the court of appeals accurately summarized the record on this point when it stated that "[t]here has been no showing that the percentage of challenges will increase substantially or that the number of hear-

ings will rise inordinately." 564 F.2d. 1219, 1235. Additionally, as the court of appeals correctly observed:

> If requiring pre-recoupment hearings would result in the filing of frivolous requests in order to delay recoupment, the present procedure should also encourage frivolous written requests for reconsideration or waiver. This is so because the present practice of the Secretary is to delay recoupment until after a determination by the Department that the request should not be granted.

564 F.2d. 1219, 1234.

On the other hand, to the extent there is any fiscal burden caused by the Secretary's forestalling recoupment until after the opportunity for an oral hearing, again there is an identical burden even under the procedures he so vigorously defends. The court of appeals specifically addressed the Secretary's claim of additional costs incurred due to delay by correctly distinguishing between the effect of delaying recoupment in this case and the consequence of the Secretary's forestalling termination in the *Eldridge* situation. As the court accurately explained:

> In the instant case we merely require the Government to exercise a little forebearance before taking money from the claimants via recoupment. There will be few if any situtations when payments will be made to ineligible persons during the course of the review. Generally, the claimant's eligibility is not at issue, the only question being whether, or when and how, his payments

> should be subject to temporary recoupment deductions.

Elliott, 564 F.2d at 1235.[17]

In an effort to quantify the alleged additional governmental costs in this case, the Secretary claims in his brief that "the 30 day notice period alone results in an annual loss of at least $850,000 in interest that could be earned if overpayments were recovered more expeditiously." Op. Br. at 47. The Secretary then proceeds, in a footnote, on the basis of 1978 statistics to detail how he reached that figure. Later in this section of his brief, the Secretary states that he "estimates that the direct cost of conducting 1,200 oral hearings annually is $100,000." Op. Br. at 48. Respondents strongly object to the untimely introduction of this factual matter into the record of this case. Respondents have never been provided with any documentation to support these claims and they have been denied any semblance of a fair opportunity to determine the authenticity, accuracy or source of these figures. Unquestionably the Secretary has attempted to supplement the record in this case with unsubstantiated factual material in direct contravention of one of the most basic admonitions of this Court that

> *This court must affirm or reverse upon the case as it appears in the record.*

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[17] In contrast, in *Eldridge* a prior hearing requirement might often result in forcing the Secretary to pay benefits to persons who were not only not ineligible for them, but who in all probability would be unable to repay. *Elliott*, at 1235, citing *Eldridge, supra*, 424 U.S. at 348.

Russell v. *Southland*, 53 U.S. (12 How.) 139, 158-159 (1851). (Emphasis added.) Respondents have been severely prejudiced by the Secretary's actions and, therefore, they urge this Court to strike page 47 and 48 of his brief or, at a minimum, disregard these offending pages.

Addressing these unsubstantiated "direct" and "indirect" cost guesses of the Secretary, it is abundantly clear that they are either inflated, erroneous, or entirely speculative, and hence they should be ignored by this Court. First, these figures must be read in light of the Secretary's own previous cost estimates in this case. In seeking a stay of the *Buffington* district court judgment in this Court and before the district court in *Elliott*, the Secretary represented, again without any corroboration, that the cost to provide pre-recoupment hearings would be between $15-40,000,000, *see e.g.*, *Elliott* v. *Weinberger*, 371 F. Supp. at 970-71, n. 31, while the actual cost was merely $100,00. Certainly the variance in these figures demonstrate the total unreliability of the Secretary's cost claims. Second, the Secretary contends that his $100,000 figure does not include the "losses incurred because of inability to recover overpayments after a prolonged pre-recoupment period . . ." Op. Br. at 50. This claim is misleading because it has been the Secretary's choice, and not the court of appeals decision, which has "prolonged" the recoupment process; the Secretary chose to continue the written submissions procedure, the opportunity for a pre-recoupment oral hearing and the post recoupment evidentiary hearing rather than follow the model successfully used in many other administrative systems of providing only one opportunity for a hearing, *prior* to any adverse

administrative action. Additionally, as discussed above at page 32, the Secretary overlooks the fact that in almost all cases social security recipients seeking waiver are *eligible* for benefits, and he is, therefore, fully secure as to recovery of any overpayment.

Moreover, the Secretary seeks to claim as indirect cost, the monies allegedly overpaid to the recipients and the interest, if any, on that money. This is certainly erroneous because a substantial portion of these funds are funds which Congress intended to be waived and, thus, would be at issue even under the challenged procedures. Furthermore, even under the Secretary's challenged procedure the Secretary would "lose" interest for at least the initial 30-day tolling period. Again, any alleged loss of interest under the court of appeals ruling is directly attributable to the Secretary's decision to delay the timing of the pre-recoupment oral hearing benefits beyond this 30 day period. Even though the Secretary chose to delay further, he still seeks to claim monetary loss, on interest, due to the court of appeals decision and not due to that choice. Obviously, there is no real loss of interest and the Secretary's attempts to assert that there is, conflict with the facts in this case.

Also, the Secretary contends that there is an "indirect" cost in that the pre-recoupment hearings will require the diversion of resources which could be used by the Social Security Administration for other, unspecified needs. The Secretary's procedures and statistics in the record belie the contention: as shown at pp. 30-31, *infra*, the Secretary must incur these costs even under the challenged procedures. Furthermore, the court-ordered safeguards in *Elliott* have *improved* the decision-making by reducing the error rate by

approximately 25%. That is, 25% fewer errors are being made under the present system than under the previous one. This is borne out of by the Secretary's own statistics which show a 50% reversal rate at the waiver determination stage now as opposed to the nearly 75% rate which Judge King found in *Elliott.* 371 F. Supp. at 967.

Furthermore, not only is the dollar cost to comply with the court of appeals decision negligible but also the number of hearings requested is very modest. Again, using the Secretary's belatedly submitted statistics, he shows only 1,200 personal conferences, *i.e.* oral pre-recoupment hearings, requested during the calendar year 1977. Not only is this a very small number of hearings at a very small cost, but the Secretary ignores the fact that these hearings would be held even under the challenged procedures, so surely they cannot be fairly labeled an "additional cost."

Like *Goldberg*, and unlike *Eldridge*, such a pre-recoupment waiver hearing is invaluable for the decision-maker in the instant case for it enables the Secretary's representative to confront the recipient in order to assess his/her culpability, needs and credibility and for each party to cross-examine witnesses. This can be accomplished readily by the type of procedure presently employed by the Secretary in response to the lower court's orders—a short personal conference with an impartial employee of the Social Security Administration at which time the recipient presents testimony and evidence and cross-examines witnesses, and the administrative employee questions the recipient. Such a procedure is the same one successfully and effectively now employed by many administrative agencies to determine, for example, eligibility for welfare, food stamps and medical assistance. *See e.g.,* 45 C.F.R. § 205.10 (1977); 7 C.F.R. § 271.1(n) (1976); 45 C.F.R. § 205.10 (1977). The administrative costs, both in terms of money and personnel, are small, while the administrative gain, in terms of reliability and efficiency in decision-making, is great.

For these reasons, it is clear that the public interest will be well served by requiring the Secretary to conduct pre-recoupment oral hearings. The minimal fiscal impact on the Social Security Administration, coupled with the insubstantial inconvenience to the Secretary's existing bureaucracy, pales when compared to the often devastating impact the present procedures have on large numbers of recipients who have suffered or will suffer from recoupment pending the waiver determination. After balancing the private interest, the risk of error and the public interest, it is evident that the court of appeals decision is correct and should be affirmed.

II.

THE DISTRICT COURTS HAD SUBJECT MATTER JURISDICTION TO GRANT CLASS AND INJUNCTIVE RELIEF

A. Under 28 U.S.C. § 1361, The District Courts Had Jurisdiction To Grant The Relief Sought.

The court of appeals found that the district courts had properly exercised subject matter jurisdiction over these cases pursuant to 28 U.S.C. § 1361. In so ruling, the court specifically rejected the Secretary's

claim that § 1361 jurisdiction was precluded by § 205(g) of the Social Security Act and this Court's interpretation of that section in *Salfi* v. *Weinberger*, 422 U.S. 749 (1975), *Matthews* v. *Eldridge*, 424 U.S. 319 (1976) and *Califano* v. *Sanders*, 430 U.S. 99 (1977). For several reasons this conclusion is the only one consistent with a substantial body of federal decisional law, with the congressional purposes in enacting § 1361, and with assuring access to federal courts to social security recipients like respondents who are challenging the constitutionality of the Secretary's *procedures* and *not* the *merits* of their claim for statuory benefits.

1. The Court Of Appeals Decision Is Consistent With Decisions Of Other Federal Appellate Courts

The pertinent provision of § 1361 relied upon by the court of appeals for subject matter jurisdiction states that district courts have

> original jurisdiction of any action in the nature of mandamus to compel an officer of the United States or any agency to perform a duty owed to the Plaintiff.

Since its enactment in 1962, § 1361 has been interpreted by federal district and appellate courts on numerous occasions and these courts have repeatedly agreed that § 1361 jurisdiction is available in cases like this which present constitutional due process questions, rather than individual claims for benefits. *White* v. *Mathews*, 559 F.2d, 852, 855-56 (2d Cir. 1977) *cert. denied sub nom; Califano* v. *White*, 435 U.S. 908 (1978); *De Lao* v. *Califano*, 560 F.2d 1384, 1388 (9th

Cir. 1977); *Ryan* v. *Shea*, 525 F.2d 268, 271-72 (10th Cir. 1975); *Frost* v. *Weinberger*, 515 F.2d 57, 61-62 (2d Cir., 1975), *cert. denied*, 424 U.S. 958 (1976); *Brown* v. *Weinberger*, 529 F.2d 514 (4th Cir. 1975); *Knuckles* v. *Weinberger*, 511 F.2d 1221, 1222 (9th Cir. 1975); *Workman* v. *Mitchell*, 562 F.2d 1201, 1205-06 (9th Cir. 1974); *Martinez* v. *Richardson*, 472 F.2d 1121, 1125-26 (10th Cir., 1973). *See also Naporano Metal and Iron Co.* v. *Secretary of Labor*, 529 F.2d 537, 539-40 (3rd Cir. 1976); *Chaudoin* v. *Atkinson*, 494 F.2d 1323, 1329-30 (3rd Cir. 1974); *Peoples* v. *U.S.D.A.*, 427 F.2d 561, 564-65 (D.C. Cir. 1969) (and cases cited therein).

Applying the identical jurisdictional analysis mandates by this Court in the context of other jurisdictional statues, these courts of appeal have uniformly ruled that mandamus jurisdiction is appropriate to either compel compliance with due process requirements or to "declare the due process requirements applicable to [the challenged] requirements." *Workman* v. *Mitchell*, *supra*, at 1206. That is, where the plaintiff has asserted a "not insubstantial" constitutional claim against a federal official, all of these federal appellate courts agree that § 1361 is a proper basis for subject matter jurisdiction.

Here, as in *Frost*, *supra*, *Ryan*, *supra*, and *White*, *supra*, respondents challenge the legality of a federal official's actions (the Secretary's recoupment procedures) which they alleged, and proved, contravene that official's duty under either the constitution (*i.e.*, the fifth amendment) or the Social Security Act (*i.e.*, § 204(b). Indeed in *Frost* v. *Weinberger*, *supra*, a case virtually identical to the case at bar, Judge Friendly ruled that a determination of the scope of the duty owed by the Secretary under the Social Security Act

and the due process clause of the fifth amendment to provide full evidentiary hearings *before* reducing survivors' benefits (based on competing claims by a deceased wage earner's illegitimate and legitimate children) was "peculiarly appropriate" for decision by a district court under § 1361. 515 F.2d at 62.[18]

Similarly, the duties respondents claimed were owed to them were consistent with prior rulings of this Court in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), and its progeny because the necessity for a pre-recoupment oral hearing here is indistinguishable from the necessity for such hearings in *Goldberg* and subsequent cases. Certainly, the district courts in the instant case could not find that the claim that the Secretary was required by the constitution or § 204(b) of the Act to provide the opportunity for a pre-recoupment oral hearing on the question of waiver was

> so insubstantial, implausible, foreclosed by prior decisions of this Court or otherwise completely devoid of merit as not to involve a federal controversy with the jurisdiction of the District Court, whatever may be the ultimate resolution of the . . . issues on the merits.

Oneida Indian Nation v. *County of Oneida*, 414 U.S. 661, 666-669 (1974). (Citations omitted.)

[18] It is noteworthy that the Secretary sought review by this Court of the *Frost* decision and review was denied approximately nine (9) months after this Court's decision in *Salfi* v. *Weinberger*, 422 U.S. 749 (1975). *Salfi* was decided on June 26, 1975 and certiorari was denied in *Frost* on March 8, 1976. *See* 424 U.S. 958 (1976).

The Secretary's contention that the foregoing jurisdictional test for mandamus jurisdiction employed by the court of appeals was improper is entirely without merit. Under the Secretary's position, the district courts would have been required to decide the merits of respondents' claims *before* determining subject matter jurisdiction. This approach is not only totally inconsistent with the teachings of the decisional law of this Court, *see e.g.*, *Hagans* v. *Lavine*, 415 U.S. 528 (1974), but also, the Secretary's position wrongly confuses the district court's determination of jurisdiction with a decision on the merits of this case.[19] Moreover, as the court of appeals correctly observed, there can be no question that mandamus jurisdiction is avail-

[19] These decisions are anchored in the teachings of this Court that

> Jurisdiction . . . is not defeated as respondents seem to contend by the possibility that averments might fail to state a cause of action on which petitioners could actually recover. For it well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. *Bell* v. *Hood*, 327 U.S. 678, 682 (1946) (citations omitted).

and furthermore that:

> Once a federal court has ascertained that plaintiffs' jurisdiction conferring claims are not insubstantial on their face, *Engineers* v. *Chicago R.I.&P.R. Co.*, 382 U.S. 423, 428 (1966), "no further consideration of the merits of the claims[s] [are] relevant to a determination of the court's jurisdiction of the subject matter." *Hagans* v. *Lavine*, 415 U.S. 528, 542, n. 10 (1974) quoting *Baker* v. *Carr*, 369 U.S. 186, 199 (1962).

able because the respondents challenged a matter about which the Secretary has no discretion. "Either [the Secretary has] met his constitutional duty to provide a certain minimum, or he has not. He has no discretion to provide less than that constitutionally required." 564 F.2d 1219, 1226.

Additionally the Secretary's assertion that mandamus jurisdiction is improper because there was a clear legal remedy under § 205 for respondents is misleading. On the one hand the Secretary has argued throughout this litigation that mandamus jurisdiction is foreclosed by § 205(g) and that the district court is barred from issuing injunctive or class-wide relief, and yet on the other hand he now boldly asserts that § 205 relief is a complete legal remedy for respondents. The absurdity of this claim is shown by the fact that respondents, in the language of § 205(g), did not seek that the district courts "affirm, modify or reverse" any decision of the Secretary; rather respondents sought affirmative relief from unconstitutional and illegal procedures used in recovering overpayments. Certainly, there is no doubt that the Secretary's position on the extremely limited scope of relief available under § 205 cannot be harmonized with his unsupportable claim that § 205 provides a full, complete legal remedy so as to preclude the availablity of mandamus jurisdiction.

2. The Court Of Appeals Ruling Is In Harmony With The Recent Decisions Of This Court.

Despite the Secretary's assertion that 205(g) of the Social Security Act is the only avenue for judicial review of all Title II cases, *see* Op. Br. at 56-57, the

court of appeals ruling is consistent with this Court's decisions in *Weinberger* v. *Salfi*, 424 U.S. 749 (1972), *Matthews* v. *Eldridge*, 424 U.S. 319 (1976) and *Califano* v. *Sanders*, 430 U.S. 99 (1977). In *Salfi*, *Eldridge*, and *Sanders* this Court distinguished between cases under Title II of the Social Security Act which involve constitutional challenges and those involving individual claims for benefits with questions related to their merits of such claims. Applying that distinction in this case, the court of appeals correctly concluded that this due process challenge was entirely beyond the province and competence of the Secretary; this conclusion is entirely consistent with the reasons stated by this Court for its rulings in *Salfi*, *Eldridge*, and *Sanders* regarding the availability of direct federal court review in cases challenging the constitutionality of the Secretary's procedures or process. As articulated in the *Sanders* opinion, this Court recongized that without specific proof of congressional intent *Salfi* and *Eldridge* do not support the Secretary's argument that § 205(h) bars federal jurisdiction for constitutional claims such as ones at bar. In *Sanders*, this Court stated that:

> [T]hose cases [*Salfi* and *Eldridge*] merely adhered to the well-established principles that when constitutional questions are at issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extradordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by "clear and convincing" evidence.

Sanders at 109 quoting *Salfi*, 422 U.S. at 762.

Nothwithstanding this *Sanders* ruling, the Secretary argues that merely by enacting § 205(h) Congress impliedly intended to bar all suits under Title 28 (1934 ed.) 52, and even to foreclose the later enacted § 1361. Op. Br. at 56. The Secretary's argument not only has no proof of supportive legislative intent, it also ignores the fact that when Congress has sought to limit the availability of mandamus jurisdiction, it has specifically enacted appropriate legislation. *See* 38 U.S.C. § 211(a) (1970), amending 38 U.S.C. § 211(a) (1958), 2 U.S. Code Cong. & Admin. News., at 3729-31 (1970) (precluding § 1361 jurisdiction over veterans benefits suits). In addition, the Secretary exaggerates the importance of the 1948 recodification of all jurisdictional statutes under Title 28. Congress specifically stated in 1948 that:

> *No inference of a legislative construction is to be drawn by reason of the chapter in Title 28 . . . in which any section . . . is placed . . .*

Act of June 25, 1948, ch. 646 Stat. 669, Misc. Prov. § 33. (Emphasis added.) The foregoing legislation eliminates any doubt that the Secretary's arguments implying congressional intent from the 1948 recodification are meritorious.

Moreover, the Secretary's contention is wholly without merit because it also ignores this Court's admonition in *Eldridge* regarding the purposes of § 205 jurisdiction in general and the finality requirements of § 205(g) (*see Salfi, supra)* in particular. In *Eldridge* this Court stated that the

> . . . core principle that these staturorily created finality requirements should be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injury to be suffered remains applicable here.

424 U.S. at 322, n. 12.

It is precisely because of the importance of maintaining some federal court review of Title II cases so as to avoid irreparable injury that the court in *White* v. *Califano*, 559 F.2d 852 (2d Cir. 1977), *cert. denied*, 435 U.S. 908 (1978), when confronted with facts analytically indistinguishable from those in respondents' case, ruled that § 1361 jurisdiction was available to the plaintiff social security recipients in their suit challenging the administrative hearing delays in adjudicating initial disability insurance claims. In *White*, plaintiffs alleged, and the court of appeals agreed, that these delays (averaging 211 days between the date of the hearing request and the final decision by the administrative law judge) violated their rights under § 205(b) of the Social Security Act. Additionally, the plaintiffs in *White* asserted that these delays contravened the due process clause of the fifth amendment. There, as here, the Secretary contended that the district court lacked jurisdiction under § 1361 because it was precluded by §§ 205(g) and (h). In rejecting the Secretary's argument, the court of appeals ruled that since *White* was not a suit seeking a decision whether the plaintiffs were ultimately entitled to social security disability benefits, *Salfi* did not preclude § 1361 jurisdiction and the Secretary owed a sufficient duty under the social security act to support mandamus jurisdiction. *White, supra*, at 856. The court then affirmed the district court's judgment in favor of plaintiffs. In unsuccessfully seeking a writ of

certiorari to review the ruling, the Secretary advanced the same arguments as in the case at bar.

Like the plaintiffs in *White*, respondents are challenging the Secretary's failure to perform a clear duty owed to them and the court's finding that § 1361 jurisdiction was proper in *White* was based on its analysis of the Social Security Act—it did not even reach the plaintiffs' constitutional claim. Indeed, if the court of appeals rejection in this case of the Secretary's attempt to bar § 1361 jurisdiction in Title II case were not a proper application of this Court's rulings, then respondents (and certainly the plaintiffs in *White)* would be foreclosed from any meaningful review of their due process claim; their only redress would be to appeal belatedly in individual cases to a district court which could *not* grant them class or injunctive relief after they were subjected to the very process they allege is illegal. Hence by relying on the limited ruling in *Salfi* and by ignoring this Court's holdings in *Eldridge* and *Sanders*, the Secretary is attempting to prevent judicial review in all Title II cases where constitutional and statutory challenges are made to the Secretary's administrative procedures or practices. The untenability of this position is clear.

3. The Court Of Appeals Decision On § 1361 Effectuates The Legislative Intent In Enacting § 1361.

Not only is the Secretary's argument that § 1361 jurisdiction is unavailable wrong for the foregoing reasons, it also conflicts with Congress' intent in passing § 1361. By enacting Section 1361, Congress expressed its support for the decentralization of mandamus jurisdiction and improved access to federal

court for citizens affected by potentially illegal federal administrative actions. *See Byse and Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and Non-Statutory Judicial Review of Federal Administrative Actions*, 81 Harv. L. Rev. 308, 310-318 (1967) (hereinafter cited as "Byse"). It is noteworthy that during the deliberation on the drafts of proposed § 1361, the Justice Department had attempted to obtain rewording which would limit the scope of § 1361 by adding language witch would dredge up the ministerial-discretionary dichotomy. *Byse, supra*, at 316.[20] Generally these attempts were rejected and Congress enacted Section 1361 with the intent that as long as a citizen had standing to sue, that citizen could seek relief under § 1361 against federal administrators who owed a duty to that citizen and were acting illegally. *Byse, supra*, at 353-355. There is no hint of any congressional approval of or acquiescence to the Secretary's position that § 1361 was to be abrogated by § 205. While it is true that in the legislative history of § 1361 there is no specific mention of § 205 of the Social Security Act, none is required because, as one of the drafters of § 1361 states:

> the purpose of section 1361 is to authorize federal courts to review and compel official action on an

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[20] *See, Byse supra* at 316. Consistent with this stated intent was Congress' desire to avoid using the term "mandamus" to the extent that it would give federal courts the impression that Congress had countenanced the troublesome, and useless, dichotomy between ministerial and discretionary duties. It is clear that Congress feared such language ("in the nature of mandamus") would resurrect this dichotomy and needlessly obfuscate the progress intended by enacting a new § 1361. *See Byse, supra*, at 315-316.

> equality with the federal district court in the District of Columbia. . .

and, therefore,

> . . . the section should be interpreted as authorizing mandatory injunctive relief in original action . . . developing the equity, rather than the mandamus tradition.

Byse, supra, at 318, 331.

Moreover, since Congress knew that prior to 1962 the federal judiciary had limited its common law mandamus jurisdiction to the federal district court in the District of Columbia and since Congress specifically intended to expand that jurisdiction to all district courts, Congress acknowledged that the pre-1962 decisional law of the District of Columbia would be highly relevant to future determinations regarding the scope of § 1361. Thus it is important that prior to 1962 the District of Columbia did not accept many of the traditional constraints on mandamus jurisdiction such as the thorny "ministerial-discretionary" distinction which is urged by the Secretary. *See Byse* at 318.[21] Undoubtedly, Congress' intent in enacting

[21] On this very point, Professor Byse has said that:

> The initial resort of a federal judge reviewing official action under section 1361, therefore, should be to the body of precedent built up in the District Court and the United States Court of Appeals for the District of Columbia. Looking to those opinions, he will find that those courts are in many cases categorizing actions that request affirmative relief not as "mandamus" cases but as "reinstatement" cases, "land patent" cases and so on, classifications that focus on the substantive issues involved rather than the writ. Most importantly these District of Columbia courts have for the most part avoided reliance on the much criticized ministerial-discretionary distinction. Since section 1361 was proposed and enacted against the background of mandamus relief as it existed in the District of Colubmia in the year 1962, it would be most unfortunate if federal courts were to regard the words "in the nature of mandamus" as an invitation to revive the artificialities of common law mandamus. *Byse, supra*, at 318.

§ 1361 was to empower the federal courts to exercise supervision over federal officials' compliance with duties owed to the citizenry. It is clear that these reviewable duties would not include review of the individual's claim for eligibility for a government program (such as a recipient's intitial eligibility for social security disability benefits or his/her entitlement for waiver of an overpayment)—Congress had already provided for review of those individual claims by enacting statutes like § 205(g). However, it is equally clear that the duty of the Secretary to afford program beneficiaries their constitutional and statutory procedural rights *is* included in such review.

In his brief, the Secretary wrongly contends that this case is governed by this Court's finding in *Salfi* that because Congress intended § 205(h) to preclude § 1331 jurisdiction there, § 1361 jurisdiction is barred here. This contention ignores that: (1) *Salfi* dealt only with limitations on review of individual claims for benefits under Title II and *not* procedural due process cases such as the case at bar; (2) unlike the legislative history of and subsequent development of § 1331, when Congress has sought to limit § 1361 jurisdiction, it has specifically done so. *See* 38 U.S.C. § 211(a) (1970) amending 38 U.S.C. § 211(a) (1958), 2 U.S. Code Cong. & Admin. News, at 3729-31 (1970).

It is evident that the court of appeals decision is consistent with the body of decisional law developed by the federal appellate courts, with the rulings of this Court in *Salfi* and *Eldridge*, and with the legislative history of § 1361. For these reasons, the court of appeals properly determined that 28 U.S.C. § 1361 provided a basis for subject matter jurisdiction in this case.

4. The District Court's Class Certification Was Proper Under § 1361

Even though the district courts had jurisdiction under § 1361, the Secretary contends that the Buffington court improperly certified the class as follows:

> 1. Withe the exceptions set forth in paragraph 2 below, plaintiffs are appropriate representatives of a class composed of all individuals eligible for Social Security benefits pursuant to 42 U.S.C. § 402 whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing.
>
> 2. The class of which plaintiffs are appropriate representatives does not include:
>
> a. Residents of Hawaii; and
>
> b. Residents of the Eastern District of Pennsylvania; and
>
> c. All other individuals who are plaintiffs or members of a plaintiff class in an action against the instant defendant challenging his practice of reducing or otherwise adjusting Social Security benefits without prior notice and opportunity for a hearing, if a decision on the merits in any such action was entered on or before October 18, 1974.

Appendix to the Secretary's Brief, at 259-60. The Secretary claims that such nationwide certification is without congressional authority and that it forecloses the opportunity for "debate" among the courts of appeal and may force this Court to review a case prematurely. Op. Br. at 75. This position is absurd for it ignores the clear provision of Rule 23(b)(2) of the Federal Rules of Civil Procedure and it seeks to restrict unduly a district judge's discretion to define and certify class actions. Moreover, the Secretary's position disregards the "debate" which occurred in the case at bar resulting in three federal courts (the *Buffington*, *Elliott*, and *Mattern* cases[22]) independently examining the Secretary's recoupment procedures and finding them illegal. Also the Secretary's position is not even consistent with his claim in his brief that a nationwide class is unnecessary because he will abide by the non-class decision of a court. *Compare* pp. 68-69 *with* 75 of Op. Br. His expressed willingness to abide by a non-class decision will preclude debate among the circuits and there would be no need for additional suits. However, despite the Secretary's claims that he would follow a definitive non-class ruling, his conduct has not shown such willingness. For example, subsequent to the authoritative ruling of the Second Circuit in *White* v. *Califano, supra*, and this Court's denial of the Secretary's request for review, the Secretary has *not* abided by the *White* decision.

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[22] *Mattern* v. *Califano*, 582 F.2d 248 (3d Cir. 1978) petition for cert. pending *sub nom.*, *Califano* v. *Mattern*, No. 78-699.

Consequently, there have been numerous suits, throughout the country, filed to obtain compliance in those circuits with *White*. *See e.g., Blankenship* v. *Secretary of HEW*, No. 76-2342 (6th Cir., Nov. 24, 1978); *Wright* v. *Califano,* Nos. 78-1174 and 78-1175 (7th Cir., Nov. 16, 1978); *Caswell* v. *Califano*, 583 F.2d 9 (1st Cir. 1978).

Furthermore, there is little doubt that the Buffington class is a classic (b)(2) action precisely because the Secretary has acted on grounds generally applicable to the whole class making final injunctive and declaratory relief as to the whole class appropriate. Rule23(b)(2). Certainly, if Buffington were not certified as it was, the predictable result would be numerous additional suits across the nation based on the identical constitutional and statutory claims at issue in *Buffington*. *See Elliott*, 564 F.2d at 1229-1230. It is precisely this evil that is avoided by national class certification. *See, e.g., Bermudez* v. *United States Department of Agriculture*, 490 F.2d 718, *cert. denied*, 414 U.S. 1104 (1973) in which the court of appeals noted that three district courts had invalidated national policies of the Department of Agriculture, but none had certified a national class. The result of barring district courts from certifying a national class is almost certainly "waste[ful]" litigation. *Metropolitan Area Housing Alliance* v. *U.S. Department of HUD*, 69 F.R.D. 633, 639, n. 11 (N.D. Ill. 1976). Such a result would serve neither the parties nor the courts. Moreover, there is no support for the Secretary's position in the legislative history of § 205(g); understandably Congress did not intend to limit the discretion of a district judge's management of a case once he had subject matter jurisdiction. Thus, the Secretary's position regarding the *Buffington* class certification is without merit and should be rejected.

B. The District Courts Also Had Jurisdiction Under § 205(g) To Grant The Injunctive Relief Sought By The Class Members

1. *Class Actions Are Available Under § 205(g)*

If this Court determines that 28 U.S.C. § 1361 does not provide subject matter jurisdiction in this case then respondents argue that the district courts properly exercise jurisdiction under § 205(g) to grant full relief to respondents and this class. That section provides in pertinent part that:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of this answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript

> of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing.

Since the Secretary concedes that there is § 205(g) jurisdiction over the claims of the named respondents in this case, the sole issue is whether the district courts, consistent with § 205(g), could grant injunctive relief to the absent members of the class.

While the Secretary concedes that § 205(g) jurisdiction exists for the named respondents (Op. Br. at 52), he argues that class-wide relief is not authorized by § 205(g) (Op. Br. at 62-68). The Secretary also claims that the classes certified below are overly broad because they include beneficiaries who had recieved overpayments as of the date of class certification but who had not requested waiver. (Op. Br. at 65.) This argument misreads this Court's decision in *Salfi*, and ignores the federal appellate decisional law interpreting *Salfi*.

In *Salfi* v. *Weinberger, supra*, this Court ruled that § 205(g) was the proper, and sole, jurisdictional basis over claims for benefits under the Social Security Act. It also held that § 205(g) jurisdiction is not available until a person has sufficiently exhausted available administrative remedies. Subsequently, in *Mathews* v. *Eldridge, supra*, this Court explained that § 205(g) jurisdiction does in itself have two elements: the first, which cannot be waived, is that a social security recipient must file a claim of entitlement to benefits with the Secretary, and the second, which can be waived, is that all other administrative remedies be exhausted prior to filing suit. 424 U.S. at 329.

Contrary to the Secretary's contention that the class in this case is barred by *Salfi* and *Eldridge*, for purposes of class certification this case is significantly different from *both Salfi* and *Eldridge* in three important aspects. First, this case does not involve a claim to entitlement or continued entitlement to benefits. *All* the class members have successfully submitted claims for entitlement. If they had not, they would not now be subject to the Secretary's overpayment recoupment efforts. Moreover, their continued entitlement to benefits is *not* at issue in an overpayment proceeding, a proceeding entirely collateral to establishing claims for entitlement. As the court of appeals determined below:

> The instant suits are quite different [from *Salfi*]. They assert a constitutional right to due process notice and hearing when alleged overpayments are recouped. They are not claims for benefits. Nor would granting the relief sought result in an entitlement to benefits. The distinction between due process questions divorced from a claim for benefits and questions related to the merits of a benefits claim is a significant one, requiring considerably different treatment by the courts.

Elliott, 564 F.2d at 1226, 17.10.

Second, both the named and unnamed plaintiffs have already submitted claims for entitlement to benefits. To require the class members to submit additional claims seeking to avoid recoupment, as urged by the Secretary, would be to require entirely super-

fluous acts.[23] The underlying purpose served by requiring the filing of a claim for entitlement is to allow "the Secretary the opportunity, prior to consititutional litigation, to ascertain . . . that the particular claims involved are neither invalid for other reasons nor allowable under the other provisions of the Social Security Act". *Salifi* at 762. There are no "other reasons" or "other provisions" available to the Secretary in the overpayment recoupment process, where the *only* possible issues are whether an overpayment occurred, the amount of such overpayment, and the recipient's eligibility for waiver. *See Blankenship* v. *Secretary of HEW*, No. 76-2342, 6th Cir. Nov. 24, 1978) slip op. 2-4; *Wright* v. *Califano*, Nos. 78-0074 and 78-1178 (7th Cir. Nov. 16, 1978) slip op. 5-8; *Caswell* v. *Califano*, 583 F.2d 9 (1st Cir. 1978); *Johnson* v. *Mathews*, 539 F.2d 1111, 1117 (8th Cir. 1976); *Liberty Alliance of the Blind* v. *Califano*, 568 F.2d 333 (3d Cir. 1977); *Tatum* v. *Mathews*, 541 F.2d 161 (6th Cir. 1976); *DeLao* v. *Califano*, 560 F.2d 1384 (9th Cir.

[23] *In Liberty Alliance of the Blind* v. *Califano*, 568 F.2d. 333 (3d Cir. 1977), the court of appeals certified a class pursuant to § 205(g). The court noted that while the Secretary had not passed on the claims of all the class members, he had "taken a final position in one of them . . . at the highest administrative level, on a legal issue common to all the class members." *Liberty Alliance, supra*, at 344. The court noted, at 343, that the Secretary's position would preclude the court from affording the class members the relief granted the named plaintiffs, even though they presented precisely the same legal issues. The court also observed that "requiring multiple exhaustion on the same issue would involve the same commitment of administrative resources unsupported by an administrative or judicial interest that Justice Rehnquist so aptly condemned in *Salfi*". (*Id.* at 345). Respondents submit the same considerations apply with equal force to the present case.

1979). *See also Norton* v. *Mathews*, 427 U.S. 524, 533-538 (1976) (Stevens, Marshall, Brennan, J.J. dissenting). (The Court did not reach the class certification issue, but dissent noted class actions under § 205(g) are proper.)

Third, unlike *Eldridge*, the class members here did not receive adequate notice about the nature and availability of the reconsideration and waiver procedure. *Elliott*, at 1223, n. 4, and 1236, n. 22 & 23. Under these circumstances, it would be fundamentally unfair to rule that § 205(g) jurisdiction does not exist for those recipients who failed to exhaust their administrative remedies, since the failure to exhaust was often due to the inadequacy of the Secretary's notice procedure.

Similar class certification questions under § 205(g) were before the Seventh Circuit in *Jimenez* v. *Weinberger*, 523 F.2d 689, 695 n. 10 (7th Cir. 1975), *cert. den.* 427 U.S. 912 (1976), and respondents submit that the *Jimenez* analysis and decision applies with equal force to this case. In *Jimenez*, the court of appeals reviewed a decision of the district court certifying a class and awarding retroactive relief to the class to unnamed plaintiffs. Previously, the Supreme Court had upheld plaintiffs' constitutional challenge to a provision of the Social Security Act which made certain illegitimate children born after the onset of the disability of their parent ineligible for benefits. The district court had defined the class as "all those denied benefits since the date of this action *solely by reason of that portion of the Act declared unconstitutional.*" *Jimenez, supra*, at 695 n. 10. (Emphasis in the original.)

The court of appeals rejected the Secretary's argument that *Salfi* required a reversal of the class certification. In so doing, the court first noted that since the class included only those who had been denied because of the challenged section of the Act, it excluded those "whose applications could have been or were rejected for other reasons as well." *Id.*

The court then concluded

> Thus, the class whose claims were properly before the district court was made up of applicants whose applications had progressed to a high enough level in the administrative proceedings where it could be, and was, determined "that the claim(s) were neither otherwise invalid nor cognizable under a different section of the Act." 95 S.Ct. at 2467. If the class is defined in this way, the exhaustion concerns embodied in § 205(g) and discussed in *Salfi* are satisfied.

Ibid. Accord: Blankenship v. *Secretary of HEW, supra: Caswell* v. *Califano supra.* Here, as in *Jimenez,* respondents' class is defined as consisting of all those who have been denied *solely* because of the challenged practice of the Secretary. Additionally, the present case is different from *Jimenez* in one significant respect. As respondents demonstrated previously, since respondents' procedural claims are entirely collateral to their substantive claims for entitlement to benefits, there is no possibility that any of the unnamed class members "could have been or were rejected for other reasons as well." *Jimenez, supra,* 695, n. 10. These recipients have claims which require no further agency action for their resolution and, consequently, this court should properly waive the § 205(g) exhaustion

requirement for the unnamed class members. Accordingly, this class was proper under § 205(g) and the class should include all those who were subject to the Secretary's overpayment recoupment practics.[24]

2. Injunctive Relief Is Appropriate Under § 205(g)

The Secretary also argues that § 205(g) precludes the grant of injunctive relief to individuals as well as to classes. The same argument was raised but not ruled on in *Norton* v. *Mathews,* 427 U.S. 524, 96 S.Ct. 2771 (1976). The court of appeals in *Elliott* did not rule on this issue. *Elliott,* 564 F.2d at 1225-1226, n. 8A. However, five appellate courts have rejected the Secretary's arugment. *Blankenship* v. *Secretary of HEW, supra; Caswell* v. *Califano, supra; Jimenez* v. *Weinberger, supra,* 694-695; *Johnson* v. *Mathews, supra,* at 1125; and *In Re Letourneau,* 559 F.2d 892 (2d Cir. 1977).

Under the Secretary's argument, it would be impossible for a social security recipient in a case not challenging his/her individual claim for benefits to obtain appropriate injunctive relief regarding the legality of the procedures to which he is, or may be, subjected. Taken together with his position that class actions are barred by § 205(g) and that § 1361 juris-

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[24] The Secretary also contends that the *Buffington* class definition in this case is improper because it includes recipients who "will be reduced or otherwise adjusted without prior notice and the opportunity for a hearing." Op. Br. at 65. This is a spurious argument. While the actual language used by Judge Sharp may appear to be too broad, that class definition is entirely proper because for all practical purposes the class covers those recipients who have, orally or in writing, sought to assert their statutory right to waiver.

diction is unavailable to adjudicate federal constitutional claims, the Secretary is asking this Court to sanction a system in which it would be utterly impossible for a social security recipient to raise a procedual issue. According to the Secretary, district courts are limited to awarding money benefits in individual cases. Such limited relief would be entirely useless for respondents who are *not* seeking review of their individual waiver determination but, rather are seeking an adjudication of their *procedural* rights. Moreover, the Secretary is taking wholly inconsistent positions before this Court regarding the availability of federal court review to respondents and their class. On the one hand he claims that § 1361 jurisdiction is unavailable because § 205(g) provides a full and complete remedy for respondents' suits. On the other hand, he insists that under § 205(g), no injunctive or class relief is available; he claims that a district court is limited to providing individual relief in individual cases. The Secretary's arguments are absolutely inconsistent and untenable.

Furthermore, the Secretary's arguments conflict with a plain reading of § 205(g) of the Social Security Act and with this Court's dispostion of *Jimenez* v. *Weinberger*, 427 U.S. 628 (1975). In *Jimenez*, because plaintiffs had challenged a federal statute on the grounds of its constitutionality, a three judge district court was empaneled under 28 U.S.C. § 2282. After an adverse ruling, plaintiffs appealed directly to the Supreme Court pursuant to 28 U.S.C. § 1253[25] *Jime-*

[25] § 1253 (Direct appeals from decisions of three judge courts) provides that:

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

nez v. *Richardson*, 353 F. Supp. 1356 (N.D. Ill. 1973). At issue in *Jimenez* was the constitutionality of 42 U.S.C. § 416(h)(3)(b) which barred certain illegitimate children from receiving social security benefits based on the earnings record of the disabled father. By accepting jurisdiction in *Jimenez*, this Court "implicitly decided" that the three judge court was properly convened, and also, that the district court had the power to grant injunctive relief in an action under § 205(g) of the Social Security Act. *Jimenez, supra* at 693. This conclusion is compelled by the fact that unless the district court had jurisdiction to enjoin enforcement of an Act of Congress, a three judge district court would not have been required under 28 U.S.C. § 2282 and this Court would not have had appellate jurisdiction under 28 U.S.C. § 1253.

Additionally, as the Seventh Circuit noted on remand in *Jimenez*:

> In his Supreme Court brief for the Government in this case the Solicitor General acknowledged that the Supreme Court's jurisdiction vested in § 1253; he did not question that jurisdiction.

523 F.2d at 693 n. 6.

Moreover, the Secretary's claim that § 205(g) bars the granting of injunctive relief this conclusion is entirely inconsistent with the wording of 205(g) which, on its face, provides subject matter jurisdiction over Title II cases for the district court to affirm, modify

or reverse the decision of the Secretary. Understandably, 205(g) does not specify in what manner the district court must affirm, modify or reverse the Secretary's decisions, and it is clear that, contrary to the suggestions of the Secretary, none should be read into it. Again, as with his position on class-wide relief, the Secretary would have this Court ignore other relevant provisions of the Federal Rules of Civil Procedure and Title 28 once 205(g) jurisdiction is invoked. This occurs because it is clear that Rule 65, for example, provides ample authority for the district use of its injunctive power where 205(g) confers jurisdiction over the subject matter. Indeed, there can be no question that district courts under 28 U.S.C. §§ 2201, 2202[26] have specific congressional authorization to exercise broad equitable powers.

Hence, it is for these reasons the courts in *Caswell* and *Johnson* and *In Re Letourneau* properly decided that "no diminution in the remedial powers of the federal courts may be inferred. Congress must speak

[26] § 2201 states:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

and § 2202 provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

clearly to interfere with the historic equitable powers of the courts it has created." (Citations omitted.) *In Re Letourneau, supra*, at 894, *Johnson, supra*, at 1125. These courts concluded that since § 205(g) did not contain any language which clearly indicated an intent to limit the district courts' traditional equitable powers, the courts would not infer such an intent.[27]

In his brief the Secretary correctly quotes from the scant legislative history of § 205(g) to the effect that Congress in 1939 added that section because

> . . . The present provisions of the Social Security Act do not specify what remedy, if any, is open to a claimant in the event his claim is denied by the Board.

S. Rep. No. 734, 76th Cong., 1st Sess. 52 (1939); H. Rep. No. 728, 76th Cong., 1st Sess. 43 (1939). The legislative history seems to establish that § 205(g) was intended to *create* rather than limit remedies. It also strongly suggests that Congress did not draft § 205(g) with procedural issues like the one at bar in mind, but instead Congress was concerned about pro-

[27] Moreover, an injunction here is a *less* drastic remedy than limiting district courts to *reversing*, modifying or affirming the Secretary's decisions under § 205(g). If the district court affirms the merits of respondents' challenges, and the Secretary's decision can only be reversed or modified, then the Secretary is, in effect, requiring the court to reverse all recoupment claims as to the class members since 60 days before the filing of the complaint. These reversals, and the immediate retroactive benefits which would flow would be a far more intrusive remedy than an injunction ordering the Secretary to provide the opportunity for pre-recoupment oral waiver hearings.

viding judicial review to social security recipients for their individual, substantive claims for benefits.

From this legislative history, the Secretary erroneously contends that Congress intended to limit the form of the relief a federal district court could grant affirming, modifying, or reversing a decision of the Secretary. Clearly the Secretary has exaggerated Congress' intent and his argument assumes, without any additional legislative history, that Congress' enactment of § 205 foreclosed the district from exercising any of the traditional equitable powers these courts have employed for decades. Certainly, by enacting § 205(g) Congress never intended to restrict a district court's power so that the court under § 205(g) could not reverse a decision of the Secretary regarding a claim for benefits under Title II on the grounds that in reaching that decision the Secretary had employed illegal procedures.

The Secretary's claim that § 205(g) bars equitable and class action relief is an unwarranted interpretation of this legislative history, is an unduly narrow view of the scope of district courts' power in resolving constitutional controversies, and would work an intolerable injustice to social security recipients.

CONCLUSION

For the foregoing reasons, the judgment of this court of appeals should be affirmed.

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APPENDIX

APPENDIX A

§ 404.507 Fault.

"Fault" as used in "without fault" (see §§ 404.506 and 405.355) applies only to the individual. Although the Administration may have been at fault in making the overpayment, that fact does not relieve the overpaid individual or any other individual from whom the Administration seeks to recover the overpayment from liability for repayment if such individual is not without fault. In determining whether an individual is at fault, the Administration will consider all pertinent circumstances, including his age, intelligence, education, and physical and mental condition. What constitutes fault (except for "deduction overpayments"—see § 404.510) on the part of the overpaid individual or on the part of any other individual from whom the Administration seeks to recover the overpayment depends upon whether the facts show that the incorrect payment to the individual or to a provider of services or other person, or an incorrect payment made under section 1814(e) of the Act, resulted from:

(a) An incorrect statement made by the individual which he knew or should have known to be incorrect, or

(b) Failure to furnish information which he knew or should have known to be material, or

(c) With respect to the overpaid individual only, acceptance of a payment which he either knew or could have been expected to know was incorrect.

[34 F.R. 14888, Sept. 27, 1969; 34 F.R. 15646. Oct. 9, 1969]

§ 404.508 Defeat the purpose of Title II.

(a) *General.* "Defeat the purpose of title II," for purposes of this subpart, means defeat the purposes of benefits under this title, i.e., to deprive a person of income required for ordinary and necessary living expenses. This depends upon whether the person has an income or financial resources sufficient for more than ordinary and necessary needs, or is dependent upon all of his current benefits for such needs. An individual's ordinary and necessary expenses include:

(1) Fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (e.g., life, accident, and health insurance including premiums for supplementary medical insurance benefits under title XVIII), taxes, installment payments, etc.;

(2) Medical, hospitalization, and other similar expenses;

(3) Expenses for the support of others for whom the individual is legally responsible; and

(4) Other miscellaneous expenses which may reasonably be considered as part of the individual's standard of living.

(b) *When adjustment or recovery will defeat the purpose of title II.* Adjustment or recovery will defeat the purposes of title II in (but is not limited to) situations where the person from whom recovery is sought needs substantially all of his current income (including social security monthly benefits) to meet current ordinary and necessary living expenses.

[32 F.R. 18026, Dec. 16, 1967, as amended at 34 F.R. 14888, Sept. 27, 1969]

§ 404.509 Against equity and good conscience; defined.

"Against equity and good conscience" means that adjustment or recovery of an incorrect payment (under title II or title XVIII) will be considered inequitable if an individual, because of a notice that such payment would be made or by reason of the incorrect payment, relinquished a valuable right (examples (1), (2), and (5)) or changed his position for worse (examples (3), and (4)). In reaching such a determination, the individual's financial circumstances are irrelevant.

[27 F.R. 1162, Feb. 8, 1962, as amended at 28 F.R. 14492, Dec. 31, 1963; 32 F.R. 18026, Dec. 16, 1967]

§ 404.510 When an individual is "without fault" in a deduction-overpayment.

Except as provided in § 404.511, or elsewhere in this Subpart F, an individual will be considered "without fault" in accepting a payment which is incorrect because he failed to report an event specified in section 203 (b) and (c) of the Act, or an event specified in section 203(d) of the Act as in effect for monthly benefits for months after December 1960, or because a deduction is required under section 203(b), (c), (d), or section 222(b) of the Act, or payments were not withheld as required by section 202(t) or section 228 of the Act, if it is shown that such failure to report or acceptance of the overpayment was due to one of the following circumstances;

(a) Reasonable belief that only his net cash earnings ("take-home" pay) are included in determining the annual earnings limitation or the monthly earnings limitation under section 203(f) of the Act.

(b) Reliance upon erroneous information from an official source within the Social Security Administration (or other governmental agency which the individual had reasonable cause to believe was connected with the administration of benefits under title II of the Act) with respect to the interpretation of a pertinent provision of the Social Security Act of regulations pertaining thereto. For example, this circumstance could occur where the individual is misinformed by such source as to the interpretation of a provision in the Act or regulations relating to deductions, or relating to the effect of residence of an alien outside the United States for more than 6 months.

(c) The beneficiary's death caused the earnings limit applicable to his earnings for purposes of deduction and the charging of excess earnings to be reduced below $1,680 for a taxable year ending after 1967.

(d) [Revoked]

(e) Reasonable belief that in determining, for deduction purposes, his earnings from employment and/or net earnings from self-employment in the taxable year in which he became entitled to benefits earnings in such year prior to such entitlement would be excluded. However, this provision does not apply if his earnings in the taxable year, beginning with the first month of entitlement, exceeded the earnings limitation amount for such year.

(f) Unawareness that his earnings were in excess of the earnings limitation applicable to the imposition of deductions and the charging of excess earnings or

that he should have reported such excess where these earnings were greater than anticipated because of:

(1) Retroative increases in pay, including back-pay awards;

(2) Work at a higher pay rate than realized;

(3) Failure of the employer of an individual unable to keep accurate records to restrict the amount of earnings or the number of hours worked in accordance with a previous agreement with such individual:

(4) The occurrence of five Saturdays (or other work days, e.g., five Mondays) in a month and the earnings for the services on the fifth Saturday or other work day caused the deductions.

(g) The continued issuance of benefit checks to him after he sent notice to the Administration of the event which caused or should have caused the deductions provided that such continued issuance of checks led him to believe in good faith that he was entitled to checks subsequently received.

(h) Lack of knowledge that bonuses, vacation pay, or similar payments, constitute earnings for purposes of the annual earnings limitation.

(i) [Reserved]

(j) Reasonable belief that earnings in excess of the earnings limitation amount for the taxable year would subject him to deductions only for months beginning with the first month in which his earnings exceeded the earnings limitation amount. However, this provision is applicable only if he reported timely to the Administration during the taxable year when his

earnings reached the applicable limitation amount for such year.

(k) Lack of knowledge by a wife, husband, or child entitled to wife's, husband's, or child's insurance benefits, as the case may be, that the individual entitled to old-age insurance benefits on the same earnings record has incurred or would incur deductions because of a violation of the annual earnings or 7-day foreign work test, whichever is applicable, provided the wife, husband, or child is not living with such old-age insurance beneficiary and did not know and had no reason to know that such beneficiary's earnings activity or the income derived therefrom has caused or would cause such deductions.

(l) Reasonable belief, with respect to earning activity for months after December 1954, that earnings from employment and/or net earnings from self-employment after the attainment of age 72 in the taxable year in which he attained age 72 would not cause deductions with respect to benefits payable for months in that taxable year prior to the attainment of age 72.

(m) Reasonable belief by an individual entitled to child's, wife's, husband's widow's, widower's, mother's, or parent's insurance benefits that earnings from employment and/or net earnings from self-employment after the termination of entitlement (other than termination by reason of entitlement to an old-age insurance benefit) in the taxable year in which the termination event occurred would not cause deductions with respect to benefits payable for months in that taxable year prior to the month in which the termination event occurred.

(n) Failure to understand the deduction provisions of the Act or the occurrence of unusual or unavoidable circumstances the nature of which clearly shows that the individual was unaware of a violation of such deduction provisions. However, these provisions do not apply unless he made a bona fide attempt to restrict his annual earnings or otherwise comply with the deduction provisions of the Act.

[27 F.R. 1162, Feb. 8, 1962, as amended at 28 F.R. 14492, Dec. 31, 1963; 34 F.R. 14888, Sept. 27, 1969; 36 F.R. 23361, Dec. 9. 1971]

§ 404.510a When an individual is "without fault" in an entitlement overpayment.

A benefit payment under title II or title XVIII of the Act to or on behalf of an individual who fails to meet one or more requirements for entitlement to such payment or a benefit payment exceeding the amount to which he is entitled., constitutes an entitlement overpayment. Where an individual or other person on behalf of an individual accepts such overpayment because of reliance on erroneous information from an official source within the Social Security Administration (or other governmental agency which the individual had reasonable cause to believe was connected with the administration of benefits under title II or title XVIII of the Act) with respect to the interpretation of a pertinent provision of the Social Security Act or regulations pertaining thereto, or where an individual or other person on behalf of an individual is overpaid as a result of the adjustment upward (under the family maximum provision in section 203 of the Act) of the benefits of such individual at the time of the proper termination of one or more beneficiaries

on the same social security record and the subsequent reduction of the benefits of such individual causes by the reentitlement of the terminated beneficiary(ies) pursuant to a change in a provision of the law, such individual, in accepting such overpayment, will be deemed to be "without fault." For purposes of this section "governmental agency" included intermediaries and carriers under contract pursuant to sections 1816 and 1842 of the Act.

§ 404.511 When an individual is at "fault" in a deduction-overpayment.

(a) *Degree of care.* An individual will not be "without fault" if the Administration has evidence in its possession which shows either a lack of good faith or failure to exercise a high degree of care in determining whether circumstances which may cause deductions from his benefits should be brought to the attention of the Administration by an immediate report or by return of a benefit check. The high degree of care expected of an individual may vary with the complexity of the circumstances giving rise to the overpayment and the capacity of the particular payee to realize what he is being overpaid. Accordingly variances in the personal circumstances and situations of individual payees are to be considered in determining whether the necessary degree of care has been exercised by an individual to warrant a finding that he was without fault in accepting a "deduction overpayment."

(b) *Subsequent deduction-overpayments.* An individual will not be without fault where, after having been exonerated for a "deduction overpayment" and after having been advised of the correct interpretation

of the deduction provision, he incurs another "deduction overpayment" under the same circumstances as the first overpayment.

[16 F.R. 13054, Dec. 28, 1951]

PART III-WAIVER

Basic Requirements for Waiver

Act-Sec.204(b)
Regulations No. 4-Secs. 404.506-404.512

5540. Legal Authority for Waiver.

Sec. 204(b) of the Act provides that there shall be no adjustment or recovery of a Title II overpayment when:

(a) The person liable is without fault; *and*

(b) Adjustment or recovery would either:

(1) Defeat the purpose of Title II of the Act; *or*

(2) Be against equity and good conscience.

See §§ 5589 ff. for the policy and procedures for waiver of recovery or adjustment of an overpayment of health insurance benefits; see §§ 5597-5597.9 concerning Title XVI waiver determinations.

5541. Fault

Since the law requires a finding of without fault in all cases before waiver may be approved, this issue should be resolved first. Where "without fault" cannot be found, a finding as to whether adjustment or recovery would either defeat the purpose of Title II or be against equity and good conscience is usually not required. However, if waiver must be denied and partial adjustment considered, development of a person's financial cirumstances may still be required (§ 5515).

Similiarly, where it cannot be found that recovery or adjustment of an overpayment would either defeat the purpose of Title II or otherwise be inequitable a finding as to the "without fault" factor is usually not required unless a decision must be made as to the rate of partial adjustment (§ 5515).

However, if there is sufficient information already in file which would support a finding with respect to any prerequisite for waiver, such finding should be documented in writing.

The term fault, as used "without fault" applies only to the person who is liable for repayment. The fact that the overpayment may have been caused by our error will not relieve the person liable from establishing that he was without fault. The fault need not necessarily involve fraud.

Fault will usually be attributed to a person liable for repayment of an overpayment where the facts show the overpayment resulted from:

(a) An incorrect statement by the person that he knew or should have known was false; *or*

(b) Failure of the person to give information that he knew or should have known was material; *or*

(c) Acceptance by the person of a payment that he knew or should have known was incorrect.

5542. Defeat the Purpose of Title II.

The phrase, "defeat the purpose of Title II," in sec. 204(b) of the Act means that recovery from a person would be contrary to the purpose and intent of the Act if it would deprive that person of income that is

reasonably necessary for ordinary living expenses. To make a finding as to whether the person has income or resources sufficient for more than ordinary and necessary living expense or is dependent upon his benefits to meet his needs, see §§ 5550-5551.

5543. Against Equity and Good Conscience.

Recovery will be against equity and good conscience where the person, in reliance upon the benefits or on notice that such benefits would be paid, relinquished a valuable right or changed his position for the worse. See § 5553 for typical examples of inequitable situations.

For certain deduction overpayments for which without fault is established, recovery or adjustment will be deemed to be because of the circumstances of the overpayment. See § 5559 for a summary of these situations.

A finding of deemed against equity and good conscience will also apply for those entitlement overpayments in which the person relied on misinformation from an official source (i.e., an agent or agency of the Government). See § 5547 where title II overpayments are involved and § 5589.2(e) for title XVIII situations.

5544. Classification of Overpayments for Purpose of Waiver.

To facilitate the development and uniform application of guides for providing waiver relief, overpayments are classified in two types: entitlement overpayments are deduction overpayments.

(a) Entitlement Overpayment

An entitlement overpayment is one that results from payment when the claimant fails to meet some requirement for entitlement (e.g., no insured status existed or payment was made after entitlement had terminated) or if the payment exceeded that amount the beneficiary was entitled to receive (e.g., incorrect computation, duplicate payment).

(b) Deduction Overpayment

Payment for a month in which a deduction or nonpayment event applied is referred to as a deduction overpayment. Deduction overpayments include the payment of benefits subject to deduction under annual earnings test or the 7-day work test, a mother's benefit received while the mother did not have a child in her care, a DIB or CDB paid after refusal to accept rehabilitation services, or a benefit recieved by an alien beneficiary after he had been outside the U.S. 6 months and did not fall within any of the exceptions to the alien nonpayment provision.

Under the annual earnings test an overpayment cannot be established until after the end of the taxable year. Therefore, waiver of recovery of such an overpayment cannot, of course, be considered until after the close of the taxable year (see § 5547.6).

5545. Use of Form SSA-632 in Developing Waiver

(a) General

When a person who had been notified of an overpayment appeals the overpayment determination or protests the proposed adjustment or the request for

refund (§ 5503.5), the SSA-632 (Overpayment Recovery Questionnaire) should be completed to permit a waiver of recovery determination to be made. Generally, the person will be assisted by the DO in completing the SSA-632 to reflect the facts surrounding the overpayment and the person's present financial situation. If the form is sent to the person to complete, or if the form is completed by telephone and is sent to the person for his signature, be sure to line out questions that do not apply for the particular type of overpayment situation involved. (See (c) and (e) below.) Take care to assure that the answers represent the person's statements and not the conclusions of the interviewer.

In addition to its use in developing waiver, the SSA-632 may also be of use in determining the rate of partial adjustment (§ 5515), in developing for compromise settlement (§ 5537.4), and in reporting an overpayment claim to GAO (§ 5532.4).

It is not essential that an SSA-632 be completed. Equivalent information in some other writing is acceptable. However, completion of the SSA-632 in accordance with the rules below should assure full development and is thus more likely to result in a proper decision.

(b) Part I—Without Fault Statement

Have the person complete this part whenever the waiver determination will be made.

(1) *Item 1*—The answer should include a complete statement by the person about his understanding of the provisions of law involved in the overpayment and the basis for his understanding.

(With respect to a health insurance overpayment, only item 1 of Part I need be completed.)

(2) *Items 2 and 3*—An indication of good faith or of the exercise of a high degree of care in complying with the reporting requirements is necessary to find a person to be "without fault."

For example, a person who made an arrangement with his employer intending to limit his earnings so that he would not incur deductions under the annual retirement test, or a person who had no such arrangement but carefully controlled his earnings for the purpose, may have shown good faith or exercised the necessary degree of care to justify a finding of without fault. The answer to these questions, therefore, should establish whether the person incurred any overpayment despite a conscientious effort on his part to stay within the earnings limitation as he understood it or whether he just worked without any concern as to the limitation.

If a person alleges he was misinformed, he should state the name of the person who gave him the wrong information, the approximate date he received it, and whether he received it through a personal contact or by telephone.

(3) *Items 4 and 5*—Although subject to rebutal, assume that each person received an explanation of entitlement and eligibility and the reporting provisions. Usually, the first explanation of entitlement and eligibility and the reporting requirements was given when the application was filed. The purpose of these questions is, therefore, to find out whether the person was actually furnished the necessary explanation was given, and his recollection of what was

explained to him. In this regard, question him about his reaction to any check stuffers and other reminder notices that he may have recieved about reporting responsibiities.

Appropriate DO observations and comments on the person's "without fault" allegation may be set out under Remarks or on an RC.

(c) Part II—Representative Payment Made

This part should be completed only if all or part of the incorrect payments were received by a representative payee. If representative payment was involved, line out this section. The answers to items 6 and 7, together with the information in Part I, will indicate whether or not the representative payee is liable for repayment of the overpayment. If the representative payee is without fault and used the funds on behalf of the beneficiary, the representative payee has no liability for repayment; in such case, a waiver determination would not be required with respect to the representative payee, and defeat the purpose (i.e., Part IV) would be developed only with respect to the beneficiary since the beneficiary is solely liable for making repayment (See § 5511 for discussion of liability and waiver where there is a representative payee.)

(d) Part III—Possession of Overpayment

All questions in this part must be answered.

(1) *Item 8*—If the person has all or part of the overpayment in his possession when first notified of the overpayment, recovery will not defeat the purpose

of title II with respect to such amount in the person's possession (§ 5546). (Note that whether or not the money has been spent, waiver can be approved when the overpaid person is without fault and recovery or adjustment would be against equity and good conscience.)

If the answer to item 8 indicates that the person still has any of the incorrect payments in his possession, advise him to return them immediately. This will serve to eliminate or reduce the overpayment. In such case, the DO will diary the case for followup action in 10 days if the person does not comply. If a refund is not received when the followup action is taken, the DO will give the reason on an RC and forward it to the PSC along with any other pertinent material. (If the DO receives a refund before the expiration of the 10-day control period, a statement concerning the refund or evidence thereof should be included with any waiver development.)

Also, in some few cases, the overpaid moneys may have been used to purchase real or personal property which is still in the individual's possession. A finding of defeat the purpose is precluded to the extent that the overpayment has been turned into clearly identifiable assets unless they are within the exceptions described in § 5550.3.

(2) *Item 9*—In addition to uncovering any possible sham disposition of assets, the answer to item 9 should help explain what happened to any large incorrect check (e.g., accrued workmen's compensation benefits which resulted in a benefit overpayment). Often such funds have not been reflected as a liquid asset nor has their expenditure been explained. Record the explanation in item 14 (Remarks).

If it is determined that a transfer of property was merely an attempt to conceal assets to avoid repayment of the debt, disregard the transfer in evaluating the debtor's net worth.

(3) *Item 10*—Take into consideration an inheritance which is expected (within 6 months) in determining a person's assets; it may be material to a "defeat the purpose" finding and a determination as to whether recovery action should be terminated.

(e) Part IV—Refund Questionnaire

Where a person seeks waiver relief, Part IV should be completed unless the person liable for repayment of a title II, title XVIII, or Black Lung overpayment receives cash public assistance (including title XVI) payments. (Line out this part in this situation so the person does not complete it.) In such a case, recovery of the overpayment will "defeat the purpose" without any further development or completion of Part IV with respect to other income, expenses, or assets. Where cash public assistance payments are alleged, contact the appropriate public assistance office to verify the debtor's current eligibility status.

If the person questions the need for furnishing financial information, explain to him that although financial resources generally are not a consideration for paying benefits, they are, as provided in law and regulations, a factor in determining whether he may be relieved from repayment of the overpayment. In some cases the beneficiary may wish to refund the overpayment, or have recovery effectd by adjustment, rather than complete Part IV, the Refund Questionnaire. If so, obtain, if possible, a signed statement from him, or prepare an RC giving the facts.

The answers to items 11-14 should reflect the overpaid person's total income from all sources, including any income of the spouse and any other *dependent* relative living in the overpaid person's household. Similarly, show the total expenses of the household and the total assets of the overpaid person and the spouse and dependent relatives who are members of the household. (A relative who lives in the household but who pays room and board and provides for all of his other needs is not a dependent; do not consider his income, expenses, or assets. For an exception to counting the income of a spouse of the overpaid person, see § 5532.4(a)(3). Also, when a representative payee is not liable for repayment because he was without fault in causing the overpayment and used the incorrect payments for the beneficiary, obtain financial information only for the beneficiary. It is only where the representative payee and the beneficiary are both liable for repayment that financial information should be obtained for both of them.

Where self-employment income is involved, show one-twelfth of the anticipated earnings for the year.

If the answer to item 13 indicates that a debt being paid by monthly installments will be liquidated in the near future (e.g., within the next 6 months), consider the effect of this decrease in usual expenses in determining the debtor's financial circumstances for defeat the purpose, referral to GAO, etc.

The claimant's allegation about living expenses, income, and assets may ordinarily be accepted if it appears reasonable considering all the circumstances in the case. If, however, the information appears incorrect or impossible, corroborating evidence will be

needed (See § 5550.5.) Obtain and record in Remarks or on an RC an explanation of why the expenses in item 13 exceed the income in item 11 where the SSA-632 does not show the source and amount of any supplemental funds received to cover the difference.

5546. Waiver Consideration When Person Has All or Part of Overpayment in His Possession

If a person has all or part of the overpaid benefits in his possession, recovery will not defeat the purpose of title II. If a person still has all or part of the overpayment in his possession at the time he is notified of an overpayment, waiver cannot apply as to recovery of that amount except where without fault is established *and* recovery or adjustment would be against equity and good conscience.

Recovery will not defeat the purpose of title II to the extend that the person liable for repayment has in his possession any of the overpaid checks or proceeds identifiable as the overpaid benefits in liquid resources. In most cases, the funds will be in the form of cash on hand, bank deposits, or securities purchased with the proceeds. A bank account built up gradually from income in addition to social security benefits will not usually permit identification of an incorrect benefit and the funds will be construed as ordinary assets. (See § 5550.3.)

Also, only if no benefit was due for a month in whch there is a deposit can proceeds of an incorrect payment be considered identifiable and in the person's possession. If only a part of a monthly benefit is incorrect in the month the desposit is made, the incorrect payment cannot be considered in the person's possession.

Just as the proceeds will not usually be identifiable as the incorrect benefit, withdrawals from an account generally preclude identification of funds remaining in the account as the incorrect benefit. For example: assume that there is $500 in a savings account and $100 is identifiable as an incorrect payment; a $50 withdrawal would leave identifiable proceeds of only $50. And, if $120 were withdrawn, it would no longer be possible to identify any part of the funds in the account as the incorrect payment.

In some few cases, the overpaid moneys may have been used to purchase real or personal property which is still in the individual's possession. Defeat the purpose of title II is also precluded to the extent that the overpayment has been turned into clearly identifiable assets unless they are within the exceptions described in § 5550.3.

Once it is determined that a person liable for repayment had in his possession an incorrect check or the proceeds of the payment at the time he was notified of the overpayment, recovery of the overpayment to the extent of the incorrect benefits determined to be (or to have been) in his possession cannot be found to defeat the purpose of title II. That a person on being notified of the overpayment fails to make restitution of incorrect benefits in his possession and subsequently disposes of the incorrect benefit cannot change the finding that recovery does not defeat the purpose of title II regardless of the person's subsequent financial circumstances.

5546.2. Months for Which Waiver May Not Be Considered

In monthly benefit cases waiver may apply only to months for which payment was certified to Treasury.

Thus, waiver cannot apply to a benefit payment which was withheld to effect recovery of a prior overpayment. The benefit so withheld is a credit rather than a payment and thus, since no payment was made, no overpayment exists for the period of withholding.

In deduction overpayment cases waiver cannot apply under the following circumstances:

(a) Where deductions are charged to different months from those in which work suspensions were imposed and there is no resultant overpayment.

(b) Where there is an overpayment for the month in which a beneficiary, (subject to the annual earnings test) reported his earnings or for the month in which he was given a proper explanation of the retirement test.

(c) Where there are overpayments for months before the beneficiary contacted us and recieved a proper explanation, if the contact was before he negotiated checks.

Fault

5547. When a Person Is Without Fault in an Entitlement Overpayment.

In determining whether "without fault" exists in entitlement-overpayment cases, it will be necessary to establish whether the person was at fault in causing the overpayment under the criteria set forth in § 5541. The determination must be based on all the facts in the individual case.

A person will be "deemed" to be "without fault" in incurring an entitlement overpayment where such overpayment is the result of the individual's reliance upon erroneous information from an official source within the SSA (or other agency of the Government). (See § 5547.1 below).

The following subsections discuss typical entitlment-overpayment situations in which without fault may or may not be established.

(a) Incorrect Benefit Rates

Usually a person is without fault because he cannot be charged with knowledge of how benefit rates are computed. However, where the error, regardless of the cause, results in a payment or payments clearly out of line with what could have reasonably been expected without fault can be established only on clear and convincing evidence.

(b) Lack of Insured Status.

In general, a person does not know the requirements for an insured status and is without fault if an overpayment occurs. Of course, if an E/R is fraudulent, a finding of without fault cannot be made unless it is clear that the person was not involved in the fraud.

(c) Duplicate Payments

A typical situation is where a woman receives benefits on her own E/R, and later we find that she had been receiving widow's benefits. If she did not withhold any information when she filed her claim, without

fault may be established; possibly she may have believed she was entitled to benefits in both capacities.

(d) Child's Benefits Not Terminated at Age 18 or Age 22.

Where benefits are not terminated promptly, the payee may very well believe the child is entitled to a check for the month he reached age 18 or age 22. Of course, where there has been a lengthy delay in stopping payment, stronger evidence is required to show why the payee did not inquire about entitlement to the benefit payments.

(e) Family Relationship

Where the overpaid person withheld information, for example about prior marriages, she is at fault in accepting payments.

On the other hand, where the claimant gave us full information and we made a payment, she would have no reason to question the payment.

(f) Medical Recovery

Evidence must show that the beneficiary could not reasonably have been aware that he was no longer under a disability.

EXAMPLE 1: Mrs. Jean Davis began receiving DIB effective September 1975 while she was in a hospital. She made a report to the SSA when she left the hospital in October 1975. As a result of a subsequently scheduled continuing disability investigation, it was determined that Mrs. Davis was again able to engage in SGA in April 1976 and, therefore, her disability ceased in that month. On June 10 Mrs. Davis was notified that her diability had ceased in April 1976 and that her last benefit payment would be for the month of June 1976. The notice also included an explanation of the right to request a reconsideration. However, through an error no action was taken to stop payment of her checks for July and August 1976. Mrs. David accepted the checks for those months and negotiated them, notwithstanding the termination letter that she had received earlier.

Mrs. Davis claimed to be without fault in causing the 2 months' overpayment. She contended she should not have to make a refund, because the SSA made the mistake in sending her checks when payment was not due.

"Without fault" cannot be established in this particular situation. Receipt of the checks for July and August 1976 after the termination letter advising that June 1976 would be the last payment due should have prompted Mrs. Davis to inquire at a social security office about whether she was entitled to additional payments. By not doing so, Mrs. Davis did not use reasonable care to avoid the overpayment. The fact that it was an error that allowed the checks for July and August 1976 to be released does not relieve her from her obligation to make an inquiry when it appears an error has been made.

EXAMPLE 2: Under the same factual overpayment situation set out above, Mrs. Davis visited a DO when she received the termination notice on June 10. Since Mrs. Davis believed she was still disabled enough to continue to receive payments, the DO assisted her in filing a request for reconsideration. The

DO advised Mrs. Davis that the case would be reexamined. The DO representative did not tell her anything about whether payments might be continued. On June 20, 1976, she was directed to report for a physical examination in connection with her reconsideration request. Payment of her benefits continued during the period in which the new medical evidence was being evaluated. A report of the results of the examination was completed early in September and it affirmed the finding that Mrs. Davis' disability ceased in April 1976 and that June 1976 was the last month of her entitlement to benefits.

When Mrs. Davis was advised that she had been overpaid for July and August 1976, she protested against refunding the amount of the incorrect payments for those months. She said she would not have cashed the checks if she had any idea that she was not entitled to them. She said that she had gone to the DO and fully explained her condition as soon as she received the notice in June 1976 that her last payment would be for June 1976. Mr. Davis also said that after the DO visit, she had been called for a physical examination so that when the checks came for July and August 1976, she thought it had been decided that she was entitled to continue to receive disability payments. Under these circumstances, it would be reasonable to find that Mrs. Davis was without fault in causing the overpayment.

(g) Return to Work in Disability Cases

To establish without fault, the file must show that the beneficiary did not withhold any material information about his work. Often without fault is precluded because the beneficiary did not disclose that

he was working when he filed—this requires close examination of the file.

Where the beneficiary tells us he did report his return to work, the file must contain evidence to show that a report had been made or an explanation from the DO as to when the beneficiary contacted that office and what information was reported. Without fault generally cannot be established for months before the report of work activity is made.

After the beneficiary reports his return to work, he is ordinarily advised that he may get his checks for a certain period; e.g., the trial work period. If it is later determinated that he was overpaid for all or some months in this period, notwithstanding that a proper report was made, he may be found without fault with respect to any checks that he accepted for this period.

If a beneficiary inquires about whether his work will affect benefits and is told that it does not constitute SGA, and he continues to do substantially the same work under the same conditions and rate of pay, he may be found without fault with respect to any overpayment resulting from a later determination that the work did in fact constitute SGA (§ 5547.1).

EXAMPLE 3: Mr. Paul Mace filed an application for DIB on may 14, 1975, stating that he became disabled in February 1975. An award approved on August 13, 1975, entitled Mr. Mace to a DIB of $196.20 effective August 1975. (His benefit was increased to $208.80. effective June 1976) He received his first check on or about September 3, 1975.

On September 13, 1975, Mr. Mace visited the DO and signed a statement showing that he returned to

work on September 2, 1975. Based on this information, the DO advised Mr. Mace that he could keep his check and he would be eligible for a trial work period. Then on September 26, 1975, the reviewing office advised Mr. Mace that after he worked for 9 months a decision would be made as to whether he actually regained his ability to work and his local DO would contact him before the end of that period to obtain needed evidence.

The DO contacted Mr. Mace on April 8, 1976, concerning his work activity, and he stated again that he began working September 2, 1975. The work was determined to be SGA and a decision of cessation was prepared on June 20 with cessation effective with June (the month following the trial work period) and benefits to continue through August. A posting reviewed in BDP in July 1976 indicated much higher earnings for the September 1975 quarter than had previously been noted; subsequent development disclosed the fact that the beneficiary had actually returned to work on July 1, 1975, rather than September. The correct date Mr. Mace began working on a regular an continuing basis was within the waiting period; therefore, he was not entitled to DIB and was not entitled to the trial work period. This resulted in an overpayment of $2,170.80 for August 1975 through June 1976.

Mr. Mace was notified of the overpayment and requested to refund the amount of the overpayment. The notice also explained his right to request waiver of recovery of the overpayment and the right to appeal the overpayment decision. He protested repayment, alleging that he had been misinformed by the DO and by the letter indicating he could receive his

benefits during the trial work period. Mr. Mace cannot be found to be without fault in causing the overpayment. It resulted from the fact that he did not give the DO the correct information about when he started to work. The information Mr. Mace received was proper on the basis of the report he had made that he started to work on September 2, 1975.

5547.1. When a Person is Without Fault in an Overpayment Involving Misinformation From an Official Source

A person will be found to be without fault in causing any type of an entitlement overpayment if he relied on incorrect information about the entitlement provisions given to him by SSA. The same is true if the information came from another Government agency which he reasonably thought was connected with the administration of the program.

Also, a beneficiary may be without fault if he attempted to obtain information about some aspect of the program or the payment of benefits but was misled because of an incomplete or technical explanation. However, misunderstanding of correct information from an official source does not justify waiver under the "misinformation" concept which provides relief from repayment without development of "defeat the purpose" or "against equity and good conscience." Therefore it is necessary to determine as definitely as possible whether the beneficiary misconstrued proper information.

In general, the "misinformation" concept does not cover overpayment situations which basically result

from administrative and clerical errors (e.g., incorrect benefit amounts shown on the award certificate).

The beneficiary must give a full explanation for his reliance on incorrect information. The explanation should be in the beneficiary's own words as destinguished from a statement prepared by the DO. The explanation should include the information which was received, the time and place it was received , and identify, if possible, the person who gave the incorrect information.

To support a finding of without fault, the beneficiary's allegation of misinformation should, it possible, be verified by the person who gave the information. If supporting evidence cannot be obtained from the person who allegedly gave the incorrect information, the person in charge of the office should furnish a detailed report as to the likelihood of misinformation being given. Since DO records are no longer available, resolve any doubts about the allegation of misinformation in favor of finding that the beneficiary did receive misinformation from an official source.

If the overpaid person is found to be "without fault" under the misinformation concept, adjustment or recovery of the overpayment will be deemed to be against equity and good conscience. (See § 5543.) Following are examples of typical situations where this rule would apply:

EXAMPLE 1: Mr. Bill Culp, a disabled individual, timely reported his return to work in the 5-month waiting period. A DO trainee incorrectly advised Mr. Culp that he had the benefit of a 9-month trial work period. If reliance on this advice, he accepted benefits which were later determined to be incorrect.

EXAMPLE 2: Mr. Milton Huff filed an application for benefits and subsequently received a benefit check covering several retroactive months. In order to assure himself that he was entitled to this check, Mr. Huff contacted a DO. The DO representative mistakenly assured him that the amount was correct and advised him to cash the check. In reliance on this advice, Mr. Huff cashed the check and spent the proceeds for the purchase of medical equipment and supplies. It was later determined that he was not entitled to payment for all the retroactive months covered by the check and was consequently overpaid.

5547.2 When a Person Is Without Fault in a Deduction Overpayment

The same basic principles govern findings of without fault in deduction overpayments as in entitlement overpayments. However, over the years we have become aware of certain typical situations where the overpaid person is without fault, which have been approved by the Commissioner. Thus, in a deduction overpayment, the overpaid person may be assumed to be without fault if the facts fall into one of the prescribed situations listed in § 5559. This assumption, however, may be overcome by facts which show bad faith or failure to exercise a high degree of care.

As indicated in § 5541, only where the overpaid person is found to be without fault need the question of whether recovery or adjustment would defeat the purpose of title II or be against equity and good conscience be developed.

5547.4 When an Overpaid Person Is at Fault in Deduction or Termination Overpayments

(a) General

An overpaid person will not be found "without fault" if the evidence shows a lack of good faith or failure to exercise a high degree of care in determining whether an event that might cause deductions or terminations of entitlement should be reported.

(g) Degree of Care

A high degree of care is expected of a person. However, it may vary with the complexity of the circumstances giving rise to the overpayment and the capacity of the particular payee to realize that he is being overpaid. Accordingly, variances in the personal circumstances and situations of individual payees are to be considered in determining the high degree of care expected of them.

EXAMPLE: Mrs. Gloria Jones, a widow who had been in benefit status since 1971, remarried on June 30, 1976. Upon receipt of a check for June, Mrs. Jones asked the clerk at a check cashing service if the June benefit was due her. The clerk advised her to cash the check because she had remarried on the last day of the month. Since Mrs. Jones was apparently aware that she might not be entitled to the June check, she should have contacted an SSA employee before cashing the check. Under these circumstances, the beneficiary failed to exercise a high degree of care in determining whether her remarriage on the last day of June would affect her entitlement to a benefit check for that month and thus cannot be found to be without fault.

If, however, Mrs. Jones had telephoned the DO but because of a misunderstanding was advised to cash the check, she would have exercised the high degree of care expected of her and would be found to be without fault in accepting payment for June 1976.

(c) Lack of Good Faith

Lack of good faith is shown where; for example, after having been given a full explanation of the retirement test the beneficiary continues to work and incurs an overpayment, or after recovery or adjustment had once been waived and the overpaid person fully instructed as to his duties under the deduction provisions, he again incurs a deduction overpayment under the same circumstances.

5547.6 Beneficiary Protests Imposition of Work Suspensions Durng Current Taxable Year

Where benefits are being withheld to prevent an overpayment under the annual earnings test and the beneficiary protests the withholding, suggesting that waiver of recovery may apply to payments already received, the DO should develop to determine the amount that may be subject to waiver and to determine the question of fault.

Waiver may be considered only as to benefits received before:

(a) The beneficiary informed SSA (i.e., DO or reviewing office) of his misunderstanding of the retirement test; or

(b) He was given a proper explanation of the test, if this was at a later date.

Therefore, the DO should establish the amount of earnings received up to the earlier of these two dates and including the month in which the date occurred. Evidence of without fault should also be developed and submitted to the reviewing office, but evidence of the beneficiary's financial ability to repay should not be obtained at this time. Since a determination of overpayment cannot be made until after the close of the taxable year the question of "defeat the purpose of title II" cannot be determined until that time.

It is appears to the reviewing office that the evidence establishes "without fault" under one of the situations in § 5559, benefits will not be withheld unless current work suspensions are otherwise in order. If benefits have previously been withheld because of these earnings, they should be reinstated. The reviewing office will send the beneficiary a letter telling him that the SSA will determine whether to withhold benefits to recover the overpayment after he has submitted his annual report following the close of the taxable year. (Where applicable the letter will also advise him of the current withholding of benefits.) The reviewing office will diary the case for January 1 of the following year at which time it will request the DO to obtain an annual report of earnings and, where necessary, completion of Part IV of the Overpayment Recovery Questionnaire. Waiver will then be considered only as to the deduction overpayments resulting from the earnings in the taxable year up to the date on which the beneficiary informed the SSA of his misunderstanding of the retirement test or to the date he was given a proper explanation of the test, whichever is applicable.

In "against equity and good conscience" cases recovery or waiver action will also be delayed until receipt of the annual report.

5547.7 Waiver of Adjustment Against Beneficiary Other Than Overpaid Person

Where a beneficiary other than the overpaid person protests an adjustment of his benefits to recoup an overpayment, waiver of adjustment should be considered with respect to such beneficiary. However, "without fault" for waiver purposes applies separately to each person from whom recoupment may be sought. This includes other beneficiaries entitled on the same E/R as well as the overpaid person.

Waiver of adjustment against the particular benefits payable to a beneficiary other than the overpaid person does not, of course, wipe out any part of the debt. Recovery of the entire overpayment still outstanding should be effected by adjustment against the benefits of any other beneficiary who is liable, if waiver relief cannot be granted to such beneficiary.

Where the overpaid person is "without fault" in causing the overpayment, it will be presumed that any other beneficiary subject to adjustment is also "without fault" unless we are on notice that the other beneficiary caused or contributed to the overpayment. Where such a presumption of "without fault" is made, waiver may apply as to any other beneficiary, provided adjustment against him would defeat the purpose of title II or be against equity and good conscience.

Where the overpaid person is not "without fault" in causing the overpayment, waiver may still apply

for any other beneficiary subject to adjustment provided the other beneficiary was "without fault" (see § 5547.8) and adjustment against him would defeat the purpose of title II or be against equity and good conscience.

5547.8 When a Beneficiary Other Than the Overpaid Person Is "Without Fault"

In determing whether "without fault" exists on the part of a beneficiary other than the overpaid person, except when "without fault" is presumed (see § 5547.7 it will be necessary to establish whether such beneficiary was at fault in causing the overpayment. "Fault" will usually be attributed to such beneficiary where the facts show the overpayment resulted from:

(a) An incorrect statement by the beneficiary that he knew or should have known was false; or

(b) Failure of the beneficiary to give information that he knew or should have known was material.

When a deduction overpayment resulting from earnings under the annual earnings or 7-day foreign work test is involved, see § 5570.

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In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

EVELYN ELLIOTT, ET AL.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

FANNIE BUFFINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1511

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

EVELYN ELLIOTT, ET AL.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, PETITIONER

v.

FANNIE BUFFINGTON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

I. THE SECRETARY'S RECOUPMENT RULES ARE CONSISTENT WITH THE SOCIAL SECURITY ACT

1. Respondents argue (Br. 6, 12-21) that Section 204(b) of the Social Security Act, 42 U.S.C. 404(b), requires the Secretary "to engage in a very exacting [pre-recoupment] inquiry in order to establish whether the recipient [of an overpayment] was at fault or whether recoupment would cause a financial hardship and be

contrary to the purpose of Title II" (*id.* at 16). Part of this statutorily required pre-recoupment inquiry, respondents contend, is an oral hearing.[1]

Although respondents now assert (Br. 15) that "[t]he exact language used by Congress in §204(b) is extremely important," they devoted scant attention to this language in the court of appeals (see Elliott Br. 39-40 & n.15; Buffington Br. 8-14). That court did not address the statutory argument in either of its opinions, and the district court in *Elliott* likewise concentrated on respondents' constitutional attack on the Secretary's procedures.[2] In view of the ordinary judicial preference to resolve questions on statutory rather than constitutional grounds where such a course is possible, the opinions below reflect an apparent assumption that if respondents are entitled to a pre-recoupment oral hearing, they are entitled to one only because the Due Process Clause, and not Section 204(b), requires it. This assumption is hardly surprising, because respondents' statutory argument is insubstantial.

The place to begin any consideration of the Social Security Act's handling of the recovery of overpayments is Section 204(a). That provision states the general rule that in cases of overpayments or underpayments "proper

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[1]A similar statutory argument is advanced by the American Federation of Labor and Congress of Industrial Organizations as amicus curiae (Amicus Br. 7-9). Recognizing that the statutory language of Section 204(b), even if construed to require some form of pre-recoupment inquiry by the Secretary, does not mention an oral hearing, the AFL-CIO suggests (*id.* at 8-9 & n.6) a remand to permit the court of appeals or the district courts to fashion an appropriate remedy for the Secretary's current practice of conducting a waiver investigation only when waiver is requested by an overpaid beneficiary. Because the Secretary's existing procedures fully comport with the relevant statutory provisions (see pages 3-9, *infra*), the alternate relief suggested by amicus is no more justified than the mandatory pre-recoupment hearings sought by respondents.

[2]The district court in *Buffington* did not write an opinion.

adjustment or recovery shall be made, under regulations prescribed by the Secretary * * *." Section 204(b) then describes an exception to the general rule that overpayments should be recovered. The statute provides that overpayments should not be recovered from "any person who is without fault if such * * * recovery would defeat the purpose of this subchapter or would be against equity and good conscience." Respondents interpret this language to mean that the Secretary may recover a Social Security overpayment only if he has first conducted a personal and financial investigation of the beneficiary involved. Included in that investigation, respondents argue, must be an opportunity for a pre-recoupment oral hearing. Respondents assert that the Act imposes this obligation to investigate whether or not the beneficiary requests waiver.

No such requirement can fairly be derived from the language, history, or purpose of Section 204(b). Section 204(b) does not direct the Secretary to conduct a "very exacting inquiry" into a beneficiary's personal and financial status before attempting to recover a previous overpayment. Indeed, the language of the statute is fully consistent with the Secretary's existing practice of notifying the affected beneficiary of the proposed recoupment and postponing recovery only when the beneficiary indicates that he does not believe he was overpaid or that, in his opinion, recovery should be waived.

Nothing requires the Secretary to engage in an inquiry that the beneficiary himself does not believe is necessary. This Court has never held that the Constitution requires the government to give a hearing to a person who does not desire one. Even when the Constitution requires some particular procedures before a decision can be made, it requires only an "opportunity" to be heard (*Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)) or "an avenue of redress * * * should [the affected

person] wish to contest" the proposed decision (*Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1, 13 (1978)). Cf. *Codd* v. *Velger*, 429 U.S. 624 (1977). There is no reason to conclude that Congress wanted the Secretary to give hearings even to persons who do not "wish to contest" his proposed decisions. Absent an assertion by the beneficiary that the Secretary's overpayment determination is erroneous or that recoupment should be waived on equitable grounds, the Secretary can legitimately conclude that recovery will not defeat the purpose of the Social Security insurance program and will not offend "equity and good conscience."

Section 204(a) explicitly contemplates a system of overpayment recoveries governed by regulations promulgated by the Secretary. The statute does not establish any particular pre-recoupment procedures; Congress instead relied on the Secretary to devise a fair and efficient method of adjusting overpayments, in light of his experience in administering the Social Security program. As this Court stated in *Mathews* v. *Eldridge*, 424 U.S. 319, 349 (1976), "substantial weight must be given to the good-faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair consideration of the entitlement claims of individuals." The Secretary's recoupment procedures produce a fair and workable accommodation between the interests of individual beneficiaries and the needs of the Social Security program. They implement, and do not violate, the statutory command to forgo recovery where it would be "against equity and good conscience."[3]

[3]The AFL-CIO and, to a lesser extent, respondents suggest that, if the Secretary's procedures result in errors, they violate the statute (Amicus Br. 5-7; Resp. Br. 4-10). This argument is unpersuasive, because any conceivable set of procedures will produce some errors. It is the errors, not the procedures, that violate the statute. If any procedure that might produce errors also were held to violate the statute, then no governmental decision could be made without elaborate prior hearings. (After all, governmental decisions in general must conform to substantive statutory rules.) But this line of argument is unavailing to respondents. The appropriate inquiry should be not whether the Secretary makes some mistakes under his procedures, but whether the procedures and their results, considered in toto, violate the Due Process Clause or Section 204(b) because they create an unacceptably great risk of mistakes.

Respondents' reading of Section 204(b) would produce absurd results. The Secretary would be required to investigate the personal and financial situation of all 1.25 million Social Security beneficiaries who are overpaid each year (Pet. App. 99a). If the statute requires such an investigation in all cases, the Secretary would be compelled to undertake a "very exacting inquiry" of the kind sought by respondents, even in cases where a beneficiary agrees that he has been overpaid and does not object to recovery. This would entail an intolerable waste of scarce administrative resources, with no benefit whatever to the beneficiary himself or the effective administration of the Social Security insurance program. It would also involve an unnecessary and unwanted intrusion into the personal lives of the thousands of beneficiaries who are content to permit the recovery of overpayments and do not object to receiving only the amount to which they are entitled.

Congressional approval of the Secretary's procedures for recovering overpayments and granting waivers in appropriate cases is implicit in the 1967 amendments to the Social Security Act and their legislative history. Congress amended Section 204(a) to provide that overpayments can be recovered from persons obtaining benefits on the basis of the overpaid person's earnings record, even if the overpaid person is no longer alive. 81 Stat. 860-861. At the same time, Congress amended Section 204(b) to provide that a beneficiary liable for repayment of an overpayment made to another person

may obtain waiver, even if the overpaid person was at fault in receiving the overpayment, as long as the beneficiary from whom recovery is sought was not at fault. *Ibid.* These adjustments in the previously existing statutory scheme governing waiver and recoupment of overpayments show that Congress reviewed the functioning of that system and found it satisfactory, except in the details changed. Had Congress thought that the Secretary's procedures for recovering overpayments were contrary to the statutory requirements, it would not have missed the opportunity in the comprehensive 1967 amendments to correct the Secretary's error. Cf. *Lorillard* v. *Pons,* 434 U.S. 575 (1978); *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 455-457 (1978).

California Human Resources Department v. *Java,* 402 U.S. 121 (1971), on which respondents rely, does not support their position. That case involved a completely different statute, Title III of the Social Security Act, providing for grants to states for unemployment compensation. The case turned on this Court's interpretation of the "when due" language in Section 303(a)(1) of the Act, 42 U.S.C. 503(a)(1). The Court found that this portion of the federal statute was incompatible with a state provision that suspended unemployment compensation benefits whenever an employer appealed a determination that a particular worker or group of workers was eligible for benefits. Accordingly, the Court invalidated the state law. Apart from the plain statutory differences between *Java* and the present case, there is a significant difference between the status of the claimants in the two cases at the time benefits are suspended or reduced. In *Java* the workers were by hypothesis entitled to benefits unless the employer was successful in overturning an eligibility determination on appeal. Here, by contrast, the Social Security beneficiaries have been overpaid, and they are not entitled to keep their overpayments unless the

Secretary determines that recovery would defeat the purpose of Title II of the Act or would be against equity and good conscience. Once the Secretary has made an initial determination, on the basis of written submissions by persons seeking waiver, that that relief is inappropriate, the rationale of *Java* does not prohibit the Secretary from proceeding with recoupment, subject to a reversal of his decision and reimbursement of withheld benefits after a hearing before an administrative law judge or further administrative or judicial review. See *Lavine* v. *Milne,* 424 U.S. 577 (1976).

2. The AFL-CIO raises two additional statutory arguments (Amicus Br. 9-12) that warrant a brief response. Neither was expressly presented to the court of appeals, and there is thus a substantial question whether the decision of the court of appeals can be sustained on these grounds. Although a party may urge in support of his judgment any grounds that were adequately preserved below (see *United States* v. *New York Telephone Co.,* 434 U.S. 159, 166 n.8 (1977)), we doubt that it is appropriate here to inject new grounds that were not raised at all. But however that may be, the arguments of amicus are groundless.

a. The AFL-CIO relies on Section 205(b) of the Act, 42 U.S.C. 405(b), as the source of an overpaid beneficiary's asserted right to an oral hearing before the beginning of recoupment. But Section 205(b) simply provides for an oral hearing after the Secretary's decision on a person's application for payment. Even if a request for waiver is an "application for payment" within the meaning of Section 205(b), the Secretary's "decision" on that request does not occur until after the beneficiary has completed and submitted the necessary forms in support of his waiver request, and the requirement of an oral hearing would not arise until after the Secretary's decision.

Section 205(b) provides at most that an oral hearing should be made available after the Secretary's decision in response to a waiver application. The statute says nothing about whether the beginning of recoupment must be postponed, pending the completion of the hearing review procedure.[4] Amicus' citation of *Greene* v. *McElroy*, 360 U.S. 474 (1959), simply assumes the conclusion amicus hopes to establish, *i.e.*, that there is some constitutional infirmity in the Secretary's existing procedures and that the Act should be construed to avoid any constitutional problem. But, as we have argued at length in our main brief, the Secretary's decision not to provide pre-recoupment oral hearings does not violate the Due Process Clause, and, accordingly, there is no constitutional problem to avoid.

b. The AFL-CIO also contends (Br. 10-12) that Section 225 of the Act, used as an aid to the interpretation of Section 205(b), indicates that the latter provision requires an oral hearing before the beginning of recoupment. This argument is incorrect. Section 225 applies only to the suspension of benefits based on disability, when the Secretary believes that the underlying disability no longer exists. The statute permits the Secretary to suspend benefits in such a situation without a prior oral hearing.

Amicus argues that the inclusion of Section 225 in Title II implies that Section 205(b) ordinarily requires an oral hearing before any reduction of benefits, but this position

[4]The proper application of Section 205(b) can be seen most clearly by considering the case of the new applicant for Social Security benefits. If his application is initially rejected by the Secretary, the Secretary is surely under no obligation to begin the payment of benefits, pending review of the initial decision at an oral hearing. Indeed the Act prohibits him from doing so. See 42 U.S.C. 405(i). By the same token, once the Secretary determines on the basis of written submissions that a beneficiary is not entitled to retain an earlier overpayment, Section 205(b) does not require the Secretary to permit the beneficiary to keep the improperly retained funds until after the initial decision has been sustained at an oral hearing.

ignores the fact that recovery of overpayments under Title II is governed by Section 204(a) and the Secretary's regulations promulgated thereunder. Section 225 is no more than another statutory provision, dealing with an entirely different situation in which the Secretary has reason to believe that the basic entitlement to benefits no longer exists; it has no bearing on the propriety of the Secretary's recoupment procedures. By definition, no beneficiary is ever entitled to an overpayment, even assuming his continued eligibility for insurance benefits. The Secretary must waive recovery only if the statutory requirements for waiver are met. Section 225 does not imply any general policy to forbid recovery of funds to which a beneficiary was not originally entitled until he has had an opportunity to demonstrate at an oral hearing why recovery should be forgiven. If anything, Section 225 suggests just the opposite result. It permits immediate suspension whenever the Secretary *believes* that disability *may have* ceased. In an overpayment situation, the Secretary *knows* that the beneficiary was not entitled to the funds he received, and therefore there is even more reason to permit recoupment to begin before an oral hearing is held.

II. RESPONDENTS' BRIEF CONTAINS NUMEROUS MISSTATEMENTS

Respondents' brief contains numerous misstatements and inaccuracies, many of which do not require a reply. We rely for the most part on the initial brief for the Secretary and respond here only to the most egregious errors in the opposing brief.

1. Respondents state categorically (Br. 4 n.1) that, when the Secretary decides to recoup a past overpayment by reducing current monthly benefits, "[t]he period of the suspension and the amount of reduction are unilaterally determined by the Secretary." If respondents mean that the Secretary acts without consulting the affected persons,

the statement is not true.[5] As the extended discussion of the partial adjustment system in our main brief indicates, the Secretary makes every effort to reach agreement with the recipients of overpayments on a mutually acceptable recovery schedule. In most cases, recovery at the rate requested by the beneficiary is granted, unless the beneficiary is at fault in receiving the overpayment or unless the Secretary's investigation of the beneficiary's financial status reveals that a higher rate of recovery will not result in any hardship. Even where a beneficiary is at fault, the Secretary will not reduce his monthly benefits by more than 25%, unless his financial situation permits more rapid recovery.

2. Respondents also assert (Br. 8, 34) that, when an overpaid beneficiary requests waiver, it is wholly within the Secretary's discretion to decide whether to defer recoupment until an initial decision on the beneficiary's waiver application has been made. This is false. See Pet. App. 126A, 130A, 134A, 139A. The Claims Manual plainly requires that recovery await the Secretary's determination with respect to waiver.

3. Respondents' brief is confusing and inaccurate in its discussion (Br. 28-32) of the Claims Manual procedures that became effective in January 1979.

Respondents mischaracterize the Secretary's position when they suggest that his argument depends on the nature of the partial adjustment system implemented by the recent changes. The Secretary fully adheres to his position, taken in the court of appeals and in the petition for certiorari, that, even without the modifications, the method for the recovery of overpayments satisfied the requirements of due process. The Constitution does not

[5]If respondents mean only that the Secretary reserves the ultimate decision to himself, the statement is true but trivial; the Secretary also makes the decision himself if he holds an oral hearing.

require a prior oral hearing; this does not depend on the precise details of the partial adjustment system. This was no reason, however, not to inform the Court of changes in the recoupment system that further diminish the private interest in the uninterrupted receipt of benefits pending an oral hearing to review the Secretary's waiver decision.

Respondents also state (Br. 31) that "apparently these new procedures prohibit the Secretary from granting 'partial adjustment' to recipients who assert their statutory rights to waiver." See also AFL-CIO Amicus Br. 8, asserting that the Secretary's procedures "penaliz[e] those who do come forward with the possibility of a larger deprivation of benefits than if they had failed to assert statutory rights." These criticisms of the Secretary's recoupment procedures are unwarranted. Partial adjustments are available to beneficiaries who seek waiver, and no penalty is imposed for requesting relief from recovery. When the financial information gathered by the Secretary in connection with a waiver request indicates that waiver is not justified and that the previous overpayment can be recovered at a rate in excess of 25% of monthly benefits without jeopardizing the beneficiary's ability to meet current expenses, there is no reason to permit recovery at a lower rate just because the beneficiary asks for it. If he is not entitled to retain the overpayment and he can afford to pay it back at a faster rate than that initially proposed by the Secretary, he should be required to do so. No penalty is involved, because the money did not belong to him in the first place.

4. Without explanation, respondents announce (Br. 21 n.10) that the Secretary does not question the court of appeals' ruling (Pet. App. 3A, 24A) that pre-recoupment oral hearings are required in situations where a request for reconsideration of the determination that an overpayment has occurred raises an issue of credibility.

This is unfounded. Both the Secretary's petition (Pet. 2, 10 n.7, 11, 18) and his main brief (Br. 16-17 n.19, 39-41) make it clear that he objects to the requirement of a pre-recoupment oral hearing in both the reconsideration and the waiver context. The existence of a credibility issue in a particular case does not require a prior oral hearing, because constitutional rules "are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." *Mathews* v. *Eldridge, supra,* 424 U.S. at 344.

5. In his main brief (Br. 61), the Secretary noted that *Frost* v. *Weinberger,* 515 F.2d 57 (2d Cir. 1975), cert. denied, 424 U.S. 958 (1976), is not persuasive authority for the existence of jurisdiction in the nature of mandamus under 28 U.S.C. 1361, because the case was decided before *Weinberger* v. *Salfi,* 422 U.S. 749 (1975), and therefore did not take account of that decision's emphasis on the exclusivity of the jurisdiction provided in the Social Security Act for review of claims arising under the Act. Respondents now assert (Br. 50 n.18) that *Frost* is still good law, because the Secretary sought review in this Court of the court of appeals' jurisdictional ruling and his petition for a writ of certiorari was denied nine months after the decision in *Salfi.*

Respondents' attempt to resurrect *Frost* is unavailing, not only because this Court has repeatedly refused to attribute significance to the denial of certiorari, but also because the petitioner in the case was not the Secretary. The Social Security beneficiary whose due process claim had been rejected by the court of appeals, after the court found jurisdiction under Section 1361, was the petitioner in *Frost.*

For the foregoing reasons and the reasons stated in the Secretary's principal brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE *

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in the national effort to assure civil rights to all Americans. The Committee membership today includes two former Attorneys General, ten past Presidents of the American Bar Association, a number of law school deans, and many

* The parties' letters of consent to the filing of this brief are being lodged with the Clerk pursuant to Rule 42(2).

of the nation's leading lawyers. Through its national office in Washington, D.C., and its offices in Jackson, Mississippi, and eight other cities, the Lawyers' Committee over the past fifteen years has enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor in voting, education, employment, housing, municipal services, the administration of justice, and law enforcement.

One of the principal tools for obtaining redress under the federal civil rights legislation for violations of constitutional and statutory rights is the class action. In fact, the Advisory Committee's Note to the 1966 amendment to Rule 23 indicates that Rule 23(b)(2) is intended to function as an effective vehicle for the bringing of suits alleging racial discrimination. *See* Advisory Committee Note reprinted at 39 F.R.D. 98, 102. The Lawyers' Committee and its local committees, affiliates, and volunteer attorneys are presently litigating numerous class action lawsuits aimed at the vindication of civil rights of large numbers of people. Our interest in these consolidated appeals derives from the fact that we have utilized nationwide class actions in this effort, and currently are involved in two such actions: *Rowe* v. *Bailar*, Civ. No. 77-1943 (D.D.C.) (involving discriminatory employment practices in the Postal Service's bulk mail handling facilities throughout the country), and *Wright* v. *Blumenthal*, Civ. No. C-76-1426 (D.D.C.) (seeking to compel the Internal Revenue Service to end the practice of granting tax-exempt status to private schools which practice racial discrimination in their admissions policies).

In the cases now before this Court, the plaintiffs successfully challenged the procedure utilized by the Secretary of HEW to recoup overpayments to beneficiaries of Title II of the Social Security Act on the ground that Petitioner's failure to give adequate notice and the opportunity for an oral evidentiary hearing before recoupment violated the due process clause of the Fifth Amend-

ment. The correctness of this ruling is the principal issue presented, but the Court has also agreed to consider an additional question raised by the government in its petition:

> Whether a nationwide class action, on behalf of persons who have not met the jurisdictional requirements of § 205(g) of the Social Security Act, may be maintained to challenge the procedures used to process Social Security cases.

The Court of Appeals held, correctly in our view, that maintenance of the *Buffington* case as a nationwide class action under Rule 23(b)(2) was not only proper but would also advance the interests of judicial administration and serve the ends of justice. 564 F.2d at 1229-30. The government contests this ruling and seems to argue that both nationwide certification and the issuance of injunctive relief were inappropriate. Adoption of this position would have ramifications far beyond the confines of these cases, and could hinder our ability to obtain meaningful relief in a broad range of civil rights cases.[1]

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[1] *Wright* v. *Blumenthal* is an apt illustration of why this is so. In 1969, on behalf of individual black parents and students in Mississippi, the Lawyers' Committee filed suit in the federal district court in the District of Columbia to enjoin United States Treasury officials from granting tax-exempt status to private schools in Mississippi which had racially discriminatory adminissions policies. The suit was brought as a class action on behalf of black parents of school children attending the Mississippi public schools. In *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C. 1971), *aff'd sub nom. Coit* v. *Green*, 404 U.S. 997 (1971), the court entered a declaratory judgment in the plaintiffs' favor and issued an injunction restraining the IRS from approving any applications for tax-exempt status from any private school located in Mississippi unless the school demonstrated, in accordance with criteria specified in the order, that it had a nondiscriminatory admissions policy. Not only did the Service fail to implement this Order in Mississippi, but because the injunctive order bound the defendants only with respect to schools in that state, the Service took no action to establish whether private schools located in other states which applied for tax-exempt status had nondiscriminatory policies, even though such schools often interfered

The Lawyers' Committee therefore files this brief as a friend of the Court urging that, in the event the Court reaches the class action question,[2] it affirm this aspect of the Court of Appeals' judgment.

STATEMENT

These suits were brought to challenge the recoupment procedures of the U.S. Department of Health, Education and Welfare in recovering overpayments to recipients of benefits under Title II of the Social Security Act. In each instance, the plaintiffs sought class certification, although the scope and the geographical boundaries of the classes are dissimilar.

Elliott v. *Califano* was filed in the United States District Court for the District of Hawaii. A class was certified consisting of all social security old-age, survivors', and disability insurance beneficiaries in Hawaii whose benefits were or might be subject to recoupment.[3] (The government has registered no objection to the statewide class designated in this case.)

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with implementation of desegregation plans required by federal court order, *see Gilmore* v. *City of Montgomery*, 417 U.S. 556 (1974). Accordingly, to avoid the necessity of state-by-state adjudication, in 1976, salaried attorneys on the staff of the Lawyers' Committee, together with other attorneys, filed a nationwide class action on behalf of 63 individual plaintiffs in seven states (now styled *Wright* v. *Blumenthal*) to compel the IRS to cease granting tax-exempt status to private schools throughout the United States which practice racial discrimination. This suit is still pending.

[2] The government advanced several of the same contentions in *Califano* v. *Mandley*, —— U.S. ——, 56 L.Ed.2d 658 (1978), but the Court vacated the judgment and remanded without reaching the issue of nationwide relief.

[3] The Court divided the class into two subclasses depending upon whether their exposure to recoupment was based upon their own annual earnings reports or upon other evidence, such as the administrator's discovery of his own error. *Elliott* v. *Weinberger*, 371 F. Supp. 960, 964 n.6 (D. Hawaii 1974).

Buffington v. *Califano* was filed in the United States District Court for the Western District of Washington by two named plaintiffs. On April 8, 1974, the court certified a nationwide class of recipients of old-age and survivors' benefits[4] "whose benefits have been or will be reduced or otherwise adjusted without prior notice and opportunity for a hearing." The government filed a motion to alter the definition of the class and, to meet the stated objections,[5] the plaintiffs suggested changes which were adopted by the court. The class was redefined to exclude residents of Hawaii and of the Eastern District of Pennsylvania[6] and "all other individuals who are plaintiffs or members of a plaintiff class in an action against the instant defendant challenging his practice of reducing or otherwise adjusting social security benefits without prior notice and opportunity for a hearing, if a decision on the merits in any such action was entered on or before October 18, 1974." App. at 259-261.

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[4] Since there was no named plaintiff receiving disability payments, the nationwide class excludes recipients of this type of benefit. Consequently, recipients of disability payments who reside in Hawaii presently receive an oral evidentiary hearing prior to any adjustments while disability recipients in the rest of the country do not.

[5] In a memorandum of law filed on October 3, 1974, the government argued that the court should exercise its discretion to modify the definition of the class for four reasons: "(1) the wealth of similar litigation currently pending throughout the country, (2) the extreme administrative burden which nationwide certification would impose, (3) the very real legal and practical problems pertaining to res judicata and collateral attack, and (4) relevant considerations of judicial efficiency and the orderly pursuit of justice." Record, Court of Appeals, Vol. II, p. 404.

[6] The Court was advised that the United States District Court for the Eastern District of Pennsylvania had held the recoupment procedures to be violations of due process, and that the government was appealing the adverse judgment. *Mattern* v. *Weinberger*, 377 F. Supp. 906 (E.D. Pa. 1974), *vacated*, 519 F.2d 150 (3rd Cir. 1975), *vacated*, *Mathews* v. *Mattern*, 425 U.S. 987 (1976), *on remand*, 427 F. Supp. 1318 (E.D. Pa. 1977), *rev'd*, 582 F.2d 248 (3rd Cir. 1978), *pet. for cert. filed*, 47 U.S.L.W. 3318 (U.S. Nov. 7, 1978).

In the Court of Appeals, the government claimed, *inter alia*, that the district court in *Buffington* abused its discretion in certifying a nationwide class action. The Ninth Circuit rejected this argument, characterizing the case as the "classic type of action envisioned by the drafters of Rule 23 to be brought under subdivision (b)(2)." 564 F.2d at 1229. Addressing the government's contention that the class should not have been designated because it was too large, the court held that there were no manageability problems in this (b)(2) class action and stressed the salutary effect of class certification in avoiding a multiplicity of actions raising precisely the same constitutional claims adjudicated in the case at bar. On the merits, the Court of Appeals sustained the district courts' determinations that the Secretary's recoupment procedures were constitutionally defective and affirmed the grants of injunctive relief.

Amicus cannot tell from the government's argument, set forth in § II.B.4. of its brief, whether it takes the position (a) that nationwide certification was an abuse of the trial court's discretion on the facts of this case, (b) that nationwide certification is never proper under Rule 23, or (c) that it was the issuance of injunctive relief, and not certification of a nationwide class, which requires reversal. We respectfully suggest to the Court that the government's treatment of these issues is not only confusing but also inadequate, and that the government has failed to comply with Supreme Court Rules 40(1)(G) and 40(5). Under these circumstances, and because resolution of the issue will not affect the merits of this appeal, we urge the Court to defer consideration of the question entirely. *Cf. Philbrook* v. *Glodgett*, 421 U.S. 707, 721 (1975). If, on the other hand, the Court determines to decide the issue, we urge that the judgment of the Court of Appeals on this aspect of the case be affirmed.

ARGUMENT

CERTIFICATION OF A NATIONWIDE CLASS IS CONSISTENT WITH THE FEDERAL RULES OF CIVIL PROCEDURE AND PROPER JUDICIAL ADMINISTRATION; MOREOVER, IT IS PARTICULARLY APPROPRIATE IN CASES INVOLVING POLICIES OF NATIONWIDE APPLICATION ADOPTED AND IMPLEMENTED BY FEDERAL OFFICIALS[7]

The government maintains that the district court abused its discretion in certifying a nationwide class in *Buffington*, but it offers no adequate justification for its conclusion. The government nowhere contends, for example, that the formal requisites of Fed. R. Civ. P. 23(a) and (b)(2) are not satisfied in *Buffington*. The action is clearly one falling within Rule 23(b)(2) since "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Moreover, the prerequisites of Rule 23(a) are met since (1) the class is so numerous that joinder of all members is impractical, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the

[7] Petitioner argues that any form of class action is improper under § 205(g) of the Social Security Act, which it says provides the only means of reviewing the determination of a claim by the Secretary, because absent class members may not have exhausted administrative appeals. We do not address this narrow question, although we note that such class actions have been sustained. *E.g., Liberty Alliance of the Blind* v. *Califano*, 568 F.2d 333, 343-47 (3rd Cir. 1977). Furthermore, in Title VII cases, this Court has clearly *rejected* the notion that class-based relief in the context of back pay awards and seniority can be barred for those unnamed class members who have not filed administrative complaints with the EEOC. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 771 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 (1975). Our view of the government's other arguments on the nationwide class claim is the same whether jurisdiction is predicated on § 205(g) or on 28 U.S.C. § 1361.

class, and (4) the representative parties will fairly and adequately protect the interests of the class. Rule 23 does not on its face contain any proscription or limitation on classes nationwide in scope.[8]

Instead, the government apparently relies on imperfectly articulated notions of judicial policy which it believes are impaired by nationwide class actions. Properly viewed, these considerations support the use of nationwide class actions in circumstances like those of *Buffington*.

A. The District Court Did Not Abuse Its Discretion in Entertaining a Nationwide Class Action to Deal with a Problem Which Is Nationwide in Scope But Subject Also to Nationwide Control by the Petitioner.

According to statistics set forth in the Petitioner's brief, 1.25 million Social Security old age, and survivor's beneficiaries are overpaid annually. (Pet. Br. at 45-46.) The recoupment procedures set forth in § 204(b) of the Social Security Act are therefore applicable to large numbers of people throughout the country. Where individual plaintiffs challenge the sufficiency of such procedures on purely legal grounds unrelated to the particular circumstances of individual beneficiaries, nationwide class certification is not only permissible, but it is desirable in order to promote judicial efficiency and avoid a multiplicity of lawsuits raising the same issue on a state-by-state or judicial district-by-judicial district basis. All such cases would involve recoupment procedures which affect all recipients in the same manner. Repetitive litigation would maximize rather than protect against the risk of inconsistent adjudications of the Secretary's responsibilities,

[8] The government argued in the Court of Appeals that the district court violated due process by its failure to require notice to the class, and abused its discretion in certifying a nationwide class because it was unmanageable, but has not raised either of these points in its brief. Therefore, neither issue is before this Court. Supreme Court Rule 23(1)(c).

which could be resolved only by the decision of this Court.[9] Hence, the district courts should have the discretion to certify a nationwide class action when in their judgment there are no problems of manageability and such treatment of an important legal issue would be desirable.

Nationwide classes have been certified in numerous federal cases under Fed. R. Civ. P. 23(b)(2), including social security cases, although this Court has not previously had occasion to address the question explicitly, *e.g.*, *Aznavorian* v. *Califano*, 47 U.S.L.W. 4037 (U.S., Dec. 12, 1978), *rev'g on other grounds*, 440 F. Supp. 788 (S.D. Cal. 1977) (individuals eligible for Supplemental Security Income); *Murry* v. *Department of Agriculture*, 413 U.S. 508 (1973), *aff'g* 348 F. Supp. 242 (D.D.C. 1972) (food stamp recipients subject to "tax dependent" disqualification); *Norton* v. *Weinberger*, 418 U.S. 902 (1974), *vacating on other grounds*, 364 F. Supp. 1117 (D. Md. 1973) (children otherwise eligible for social security benefits who were not living with or were not supported by their father at the date of his death); *Bermudez* v. *Department of Agriculture*, 160 U.S. App. D.C. 150, 490 F.2d 718 (D.C. Cir.), *cert. denied*, 414 U.S. 1104 (1973) (impoverished persons denied retroactive food stamp adjustments after wrongful withholding due to administrative error); *Rocky Ford Housing Authority* v. *Department of Agriculture*, 427 F. Supp. 118 (D.D.C. 1977) (individuals and organizations which would benefit from implementation of rural rent supplement program); *Underwood* v. *Hills*, 414 F. Supp. 526 (D.D.C. 1976) (tenants in housing projects subsidized under § 236 of National Housing Act); *Metropolitan Area Housing Alliance* v. *HUD*, 69 F.R.D. 633, 638-39 (N.D. Ill. 1976) (owners and renters of residential properties covered by

[9] Nevertheless, Petitioner argues against nationwide class certification because it may cause this Court to review rulings affecting procedures of national application "prematurely". *See* pp. 12-15, *infra*.

mortgages insured by the Federal Housing Authority subject to dispossession under a HUD "vacancy requirement"); *Woodward* v. *Rogers*, 344 F. Supp. 974 (D.D.C. 1972) (passport applicants required to swear or affirm allegiance); *see also, Ste. Marie* v. *Eastern R.R. Ass'n*, 72 F.R.D. 443 (S.D.N.Y. 1976) (female employees of defendant located in eighteen-state area).

Nationwide class actions have also been certified in Rule 23(b)(1) and Rule 23(b)(3) actions. *E.g., United States* v. *Larinoff*, 431 U.S. 864 (1977), *aff'g* 533 F.2d 1167, 1181-1187 (D.C. Cir. 1976); *Illinois* v. *Harper & Row Publishers, Inc.*, 301 F. Supp. 484, 492-94 (N.D. Ill. 1969); *West Virginia* v. *Charles Pfizer & Co.*, 314 F. Supp. 710, 723 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d. Cir.), *cert. denied sub nom. Colter Drugs, Inc.* v. *Charles Pfizer & Co.*, 404 U.S. 871 (1971).

This substantial experience with nationwide class actions demonstrates that the problems contemplated by the government either have not arisen or have been properly handled through the district courts' discretion.[10]

B. No Valid Policy Considerations Support The Government's Contention That Nationwide Class Actions Should Not Be Permitted.

The government's argument that nationwide class certification should be discouraged because it precludes

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[10] In *Buffington*, the district court exercised its discretion by limiting the scope of the nationwide class so as to exclude not only the statewide class members in Hawaii covered by the *Elliott* order and the class members in the Eastern District of Pennsylvania covered by *Mattern* v. *Weinberger, supra*, but also

> . . . all other individuals who are plaintiffs or members of a plaintiff class in an action against the instant defendant challenging [the same practice] . . . if a decision on the merits in any such action was entered on or before [the entry of judgment in *Buffington*].

This exclusion assured that the order entered by the *Buffington* court would in no way conflict with any other order of any other federal district court which had previously ruled on the issues raised in *Buffington* and thereby subject the Secretary to conflicting injunctive obligations.

multiple consideration of the same legal issue by federal courts flies in the face of Rule 23. "The class action was an invention of equity . . . mothered by the practical necessity of finding a procedural device so that mere numbers would not disable large groups of individuals, united in interest, from enforcing their equitable rights nor grant them immunity from their equitable wrongs. . . ." *Montgomery Ward & Co.* v. *Langer*, 168 F.2d 182, 187 (8th Cir. 1948). One of its important functions is to eliminate the possibility of repetitive litigation. C. Wright, THE LAW OF FEDERAL COURTS 306 (2d ed. 1970). And, as the Court of Appeals said in *Elliott*:

> [i]t would be a practical absurdity were the Secretary to provide the due process safeguards enunciated herein to the exclusion of all save the named plaintiffs. Multiplicity of actions based on the same constitutional claims advanced here would inevitably result.
>
> Obviating such unnecessary duplication is the very purpose for which Rule 23(b)(2) was designed. Maintenance of the instant case as a class action is not only proper, but it also will effectuate the interests both of judicial administration and of justice.

564 F.2d at 1229-30.

Despite the common sense of this observation, the government frequently relitigates the same issue, rather than seeking review in this court of adverse rulings, in an effort to obtain authorization to administer national programs as it desires in at least part of the country.

Such repetitive litigation strategy was roundly criticized in *May Department Stores* v. *Williamson*, 459 F.2d 1147 (8th Cir. 1977) (concurring opinion). There, the Eighth Circuit held that the U.S. Postal Service is not immune from garnishments to effectuate state court judgments. In his concurring opinion, Judge Lay suggested, as an alternative to the Court's holding on the merits, that

the U.S. Postal Service should be collaterally estopped from relitigating the issue. In 1975, the Seventh Circuit had decided the identical issue against the government. Motions for rehearing and rehearing *en banc* in that case had been denied, and the government had elected not to petition for *certiorari*. Nevertheless, the Postal Service continued to claim immunity, at enormous judicial—and ultimately public—expense:

> The government's refusal to follow the dictates of the Seventh Circuit decision has created a wave of repetitious litigation and confusion in federal district courts throughout the United States. . . . At least a dozen other district courts in five circuits have heard garnishment requests and entered orders of memoranda in accord with the Seventh Circuit opinion. . . . The government is appealing many of these decisions, admittedly in an attempt to obtain a favorable opinion from another circuit before seeking review by the Supreme Court.

549 F.2d at 1150.

Judge Lay condemned the practice of repeated litigation under these circumstances, proposing application of the collateral estoppel doctrine and citing *Blonder-Tongue Laboratories, Inc.* v. *University Foundation*, 402 U.S. 313 (1971). (549 F.2d at 1149.) He emphasized that, where the only issue is one of narrow statutory construction (as with the Social Security provision before the Court here), consideration by several Courts of Appeals is not beneficial to the Supreme Court. The "government litigation strategy of forum shopping is grossly outweighed by the tremendous burden and costs placed on the federal courts by its continuing relitigation of the same issue." 549 F.2d at 1150.

The government argues that it is desirable to have different aspects of an issue explored by the lower courts, and that nationwide class certification effectively precludes this. The government relies on *Divine* v. *Commissioner of Internal Revenue*, 500 F.2d 1041, 1049 (2d Cir. 1974), for the proposition that it would be "imprudent, if not irresponsible" for any one judicial decision to foreclose further consideration by other courts. The *Divine* court's comment, however, was based upon peculiarities of tax refund suits and its reasoning actually supports the use of nationwide class actions in other, appropriate cases such as *Buffington*.

Divine involved the question whether a corporation could properly reduce its earnings and profits to account for compensation expenses incurred through sales of stock to employees at reduced prices pursuant to restricted stock options. In addition to their argument on the merits, the taxpayers contended that the IRS was collaterally estopped by virtue of a decision by the Seventh Circuit against the government on the identical question. Finding this Court's pronouncements on collateral estoppel not controlling [11] in the context of the question before it, the Court of Appeals turned to policy considerations to resolve the question.

First, the Court took pains to distinguish cases arising under the tax laws from other statutes, on the basis of the former's unusual complexity and the complicated array of facts typically involved in any case. Second, the Court pointed out, because the IRS has traditionally refused to regard the decisions of the Courts of Appeals as binding beyond the circuit, the only dispositive answer can come from this Court. Since a conflict among Circuits is often a necessary prerequisite to Supreme Court review, the Court of Appeals was unwilling to adopt a position that would have the effect of inhibiting *expeditious* Supreme Court review. 500 F.2d at 1049. The

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[11] *See Parklane Hosiery Co.* v. *Shore*, 47 U.S.L.W. 4079 (U.S., Jan. 9, 1979).

reason for rejecting the collateral estoppel argument, according to the *Divine* court, was to avoid a result which "would decrease the probability that a conflict [leading to Supreme Court review] will be created as quickly as possible." Id. 1049-1050.

Unlike the questions of tax law addressed by the Court in *Divine*, the issue in this case is a narrow question of pure law not likely to be affected by the factual context of cases in different jurisdictions. Rather than permitting consideration of disparate fact patterns, the government's policy of repetitive litigation simply delays the ultimate resolution of the substantive question—precisely what the *Divine* court was trying to avoid.

The government also argues that nationwide class action certification may lead this Court to grant review of an issue which it might not consider pressing but for the nationwide impact of a decree. Many factors go into this Court's decision to grant *certiorari* to review the decisions of the Courts of Appeals, and the scope of the relief ordered may be a relevant consideration in assessing the public importance of the matter. Supreme Court Rule 19. However, nationwide class relief is apt to be granted only in cases involving implementation of federal programs affecting millions of individuals (another indication of public importance).

This Court is fully capable of protecting its discretionary jurisdiction. In some cases, it may affirm the judgment of the lower court on the merits without further consideration. In others, it may issue a stay of any injunctive order pending full consideration by the Court. The Court may vacate the judgment and remand for reconsideration if it appears that the issues were not properly ventilated, or if intervening changes in the law have altered the posture of the legal issue presented. *E.g.*, *Mattern* v. *Weinberger*, *supra*. *Amicus* suggests that the government's concern is not with this Court's

docket but rather with its own timetable for seeking review by the Court.

The certification of a nationwide class action is not only appropriate under Rule 23, but is a judicious method of achieving finality of decision as soon as possible in order to achieve consistent application of policy in a federally administered benefit program. If the government is dissatisfied with the decision, it may seek a stay from the District Court, Court of Appeals, or this Court while it brings a case up for review. This is preferable to the altogether too frequent practice of relitigating the issue in the several Circuits without seeking Supreme Court review of unfavorable judgments. This practice can result in undesirable, geographically piecemeal implementation of federal program requirements and even constitutional rulings. As Judge Lay stated in *May Department Stores* v. *Williamson supra*, 549 F.2d at 1150:

> [w]here there exists an important national question, as here, and there is an obvious means available to achieve finality of decision, the government should not avoid review simply because it believes the Supreme Court might rule against it, or because it disagrees with the decision of a lower federal court.[12]

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[12] Certification of a nationwide class action is also consistent with the policies underlying creation of the Judicial Panel on Multidistrict Litigation, *see* 28 U.S.C. § 1407. These policies promote the just and efficient conduct of civil actions involving one or more common questions of fact pending in different judicial districts and avoid the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts. *See In Re Plumbing Fixture Cases*, 298 F. Supp. 484, 490-492 (Jud. Pan. Multi. Lit. 1968). In *Illinois* v. *Harper & Row Publishers, Inc.*, *supra*, a case involving a transfer under § 1407, the district court to which the case was transferred certified a Rule 23(b)(3) nationwide class action.

C. Nationwide Injunctive Relief In a Nationwide Class Action Is Authorized by Rule 23(b)(2) and Did Not Constitute an Abuse of Discretion in This Case.

The government's argument that the court erred in directing the petitioner to afford the same due process hearings to all recipients of Old Age and Survivors' benefits can be characterized only as frivolous. Rule 23 (b) (2) itself provides for injunctive relief on behalf of the entire class:

> 2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole.

It is true that in some areas, notably in cases involving issues of federalism, this Court has indicated that injunctive relief should be sparingly applied. *See, e.g., Rizzo* v. *Goode*, 423 U.S. 362 (1976). *But see, Wooley* v. *Maynard*, 430 U.S. 705 (1977). Any such considerations are absent from this case.

The cases cited by the Petitioner are totally inapposite. *Dayton Board of Education* v. *Brinkman*, 433 U.S. 406, 420 (1977); *Whitcomb* v. *Chavis*, 403 U.S. 124, 160-161 (1971); and *Milliken* v. *Bradley*, 418 U.S. 717 (1974) all involve the parameters of injunctive relief by federal district courts in school desegregation and state legislative reapportionment cases. They do not support the broad proposition that equity jurisprudence does not permit the courts to redress wrongs on behalf of a class similarly situated to the named plaintiffs. Indeed, contrary to the implication in Petitioner's argument that the injunction in this case benefits persons not suffering injury, by definition there is no difference between the named plaintiffs and the class they represent.

Furthermore, injunctive, rather than declaratory, relief is necessary to provide full protection to the plaintiffs and the members of the class. The Secretary's actions in this and other cases make it clear that he will apply decisions unfavorable to the recoupment policy only in those jurisdictions covered by district court or appellate court decisions enjoining his policy. Absent injunctive relief during the pendency of any appeals, recipients, whose benefits are reduced to accomplish repayment or who are required to refund the amount overpaid by a different method pursuant to § 204, without adequate notice or hearing, would be required to sue the government to recover illegally recouped funds. Such claims may well be regarded as retroactive benefits and recovery barred by the doctrine of sovereign immunity. *Cf. Edelman* v. *Jordan*, 415 U.S. 651 (1974).

While injunctive relief would require the government to forego recoupment without notice or hearing until final appellate review has been secured, with possible loss of payment (either because class members may no longer be receiving benefits or because they have no independent means), on balance, the social security recipients' interest outweighs the government's under circumstances where the statutory provision at issue is designed to forego recoupment except in narrowly prescribed situations. In addition, judicial economy is served by injunctive relief if such relief avoids the possibilities of additional litigation by, for example, avoiding mootness which would also result in multiple actions. *Hoehle* v. *Likens*, 530 F.2d 229 (8th Cir. 1976); *Woe* v. *Mathews*, 408 F.Supp. 419, 429 (E.D.N.Y. 1976).

CONCLUSION

In suggesting that judicial policy precludes certification of nationwide class actions in all cases, the Petitioner seeks to prove too much. Nothing in Rule 23 supports such a notion and the district courts have followed the dictates of informed discretion in granting class relief

national in scope, especially when the validity of administrative practices under federal benefit programs are successfully challenged. The determination of when nationwide adjudication is appropriate should remain where it properly belongs—within the sound discretion of the federal district courts. Nothing in the Petitioner's brief suggests that that discretion was abused in this case and, accordingly, this aspect of the decision below should be affirmed.

Respectfully submitted,

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In The

Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, et al.,

Petitioners,

v.

EVELYN ELLIOTT AND BENITO MOLINA, et al.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, et al.,

Petitioners,

v.

FANNIE BUFFINGTON AND FRANCES BINER, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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MISCELLANEOUS:

Report of the Advisory Council on Social Security, H.R. Doc. No. 9290, 92nd Cong., 1st Sess. 8

20 CFR Sections 404.57 & 508 7

In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1511

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, et al.,

Petitioners,

v.

EVELYN ELLIOTT AND BENITO MOLINA, et al.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, et al.,

Petitioners,

v.

FANNIE BUFFINGTON AND FRANCES BINER, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed in support of the posi-

tion of the respondents by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 106 national and international labor unions, having a total membership of approximately 13,500,000 working men and women, with the consent of the parties, as provided for by Rule 42 of the Rules of this Court.

For many retired or disabled members of AFL-CIO unions, and for many survivors and dependents of members, social security benefits, derived from contributions during years of employment, are the major source of funds for meeting daily living expenses. Any suspension of such benefits pursuant to the procedures at issue in this case is likely to cause such individuals to forego the most basic necessities for the period of the suspension. Later reimbursement of erroneously withheld benefits will not supply these necessities at the time they were needed. Thus, the AFL-CIO is interested in assuring its members that the promise represented by the social security system is not an illusory one. In furtherance of this interest, the AFL-CIO participated as *amicus curiae* in *Mathews* v. *Eldridge*, 424 U.S. 319.[1]

ARGUMENT

1. *Introduction.* At this juncture, the only issue in this case is whether the procedures used by the Secretary of Health, Education and Welfare in applying § 204(b) of the

[1] The AFL-CIO has also appeared as *amicus curiae* in other cases relating to the procedures involved in social benefit programs, including *California Human Resources Dept.* v. *Java*, 402 U.S. 121 and *Fusari* v. *Steinberg*, 419 U.S. 379.

Social Security Act, 42 U.S.C. § 404(b), are valid.[2] That section, which comes into play only when there has been an overpayment of benefits, provides:

> In any case in which more than the correct amount of payments has been made, *there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience.* [Emphasis added.]

Thus far, this case, and *Mattern* v. *Mathews*, 582 F.2d 248 (C.A. 3) pending on petition for *certiorari, sub nom., Califano* v. *Mattern*, No. 78-699 have both proceeded upon the assumption that the statutory scheme permits the system used by the Secretary in applying § 204(b). It is our view, however, that careful examination of the statutory scheme suggests that the present procedures may well violate the statute itself. If so, there would be no need to address the constitutional question principally raised by respondents and addressed by the Court of Appeals.

2. *Reasons for A Statutory Approach.* This Court, as one of the rules it has developed "for its own governance

[2] Two other questions decided below are no longer at issue. First, the Secretary apparently does not dispute the portion of the judgment requiring considerably clearer notice of the rights of beneficiaries in overpayment cases than has heretofore been provided. (See Pet. App. 34A-35A; 115A; compare Sec. Br. 2 (Questions Presented).) Second, while the Ninth Circuit opinion would have required oral hearings on the overpayment issue itself in certain limited instances, respondents, we understand, are not defending this portion of the judgment.

in the cases confessedly within its jurisdiction under which it [avoids] passing upon a large part of all the constitutional questions pressed upon it" (*Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 346 (Brandeis, J., concurring)), recognizes as its "first obligation" to determine whether governmental action taken pursuant to a federal statute is indeed sanctioned by that statute. (*United States* v. *C.I.O.*, 335 U.S. 106, 110.) If "a construction of the statute is fairly possible by which the [constitutional] question may be avoided" (*Crowell* v. *Benson*, 285 U.S. 22 62), then the Court will adopt that construction, if necessary, "[o]n its own motion." (*C.I.O., supra*, 335 U.S. at 129 (Frankfuter, J. concurring); see also, e.g., *Machinists* v. *Street*, 367 U.S. 740, 749; *Pipefitters* v. *United States*, 407 U.S. 385, 400-401; *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134.)

This principle applies with particular force where serious constitutional issues relating to alleged deprivation of procedural due process rights have been raised:

> Where administrative action has raised serious constitutional problems, the Court has assumed that Congress or the President intended to afford those affected by the action the traditional safeguards of due process. See, e.g., *The Japanese Immigrant Case*, 189 U.S. 86, 101; *Dismuke* v. *United States*, 297 U.S. 167, 172; *Ex parte Endo*, 323 U.S. 283, 299-300; *American Power Co.* v. *Securities and Exchange Comm'n*, 329 U.S. 90, 107-108; *Hannegan* v. *Esquire*, 3217 U.S. 146, 156; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49. Cf. *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337; *United States* v. *Rumely*, 345 U.S. 41. These cases reflect the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition. [*Greene* v. *McElroy*, 360 U.S. 474, 507-508.][3]

Whatever the ultimate view of this Court would be on the merits of the constitutional issues here involved, the opinion below, and that in *Mattern, supra*, demonstrate that those issues are "serious." Indeed, both opinions address the constitutional detail and with learning and sensitivity. We cannot therefore add to the demonstration there made. But we can and do show now that a reading of the relevant statutory provisions to require an opportunity for an oral hearing on the applicability of § 204(b) *prior* to recoupment is "not only fairly possible but entirely reasonable." (*Street, supra*, at 750.)

3. *The Present Procedures.* In summary, the system for determining whether recoupment will be waived presently works as follows:[4] The Secretary announces in writing to a beneficiary that there has been an overpayment, and that recoupment of the overpayment will begin approximately

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[3] Thus, in *Java, supra*, 402 U.S. at 124 the Court first considered whether or not the state's procedures for determining eligibility for unemployment compensation were consistent with federal law; having held that they were not the Court had no occasion to reach plaintiff's due process contention.

[4] While this case has been pending, there have been changes in procedures, the last of which are included in the revised 1979 Claims Manual, and portions of which are appended to the Secretary's Brief. It is unclear the extent to which certain of the present procedures are the direct result of the lower court judgments in this case and in *Mattern*, and ought therefore not be considered for present purposes. For example, the Claims Manual sections which appear at Pet. App. 119A *et seq.* are not dated. Since they refer to "[p]rocedural due process" requirements, they may well represent, in their stress upon personal contact with the claimant as part of the pre-recoupment waiver requirement (Pet. App. 128A et seq.) an attempt to meet the judgments below. If so, one cannot assume that the same instructions would remain in effect if those judgments were reversed.

30 days later. Although the claimant is informed generally of the provisions of § 204(b), no attempt whatever is initially made to ascertain whether government has overcome the bar to repayment declared in that provision. Rather, the burden is placed upon the beneficiary, upon reading a summary of § 204(b), to come forward and claim protection under the section.

Further, under the 1979 Claims Manual provisions appended to the Secretary's Brief, the claimant is affirmatively discouraged from seeking a determination under § 204(b). For, if no such determination is sought, recoupment will ordinarily proceed at a rate of 25% of each benefit check due, unless the claimant proposes withholding of a lesser amount; in that case, the lesser amount will be permitted if it will result in complete recovery, at a rate of at least $10 per check, within 48 months or before benefits terminate, whichever is the shorter period. (Sec. Br., 31; 2a-7a). If, however, the claimant invokes the applicability of § 204(b) but the Secretary disagrees, amounts greater than 25%, and greater than any amount requested, may be withheld. (*Id.*, at 32 n.24, 8a-12a.)

The claimant who despite this discouragement, does come forward to claim the protection of § 204(b) is not assured, prior to losing present benefits for which his eligibility is not in question, a decision-making process reasonably likely to decide accurately the pertinent issues under § 204(b). As the Court of Appeals noted (Pet. App. 26A-30A), the waiver determination involves, under the Secretary's regulations interpreting § 204(b), many questions which cannot reliably be decided upon written submissions alone. For example, the decision whether an individual was "without fault" as regards an overpayment includes an assessment of the per-

son's "intelligence * * * and physical and mental condition" as well as an assessment of what "he knew or should have known * * * or could have been expected to know." (20 CFR § 404.507.) Deciding whether recovery would be "against equity and good conscience" similarly involves an individualized assessment of a claimant's circumstances, and of whether he or she has acted reasonably in those circumstances. (20 CFR § 404.508.) While deciding such questions purely upon written submissions may be bureaucratically efficient, such a procedure wantonly sacrifices the accuracy and sensitivity of decisions depending in large part upon an assessment of an individual's *bona fides*.[5]

4. *The Statute and Its Meaning.* Assessing the validity of these procedures under the statutory scheme involves reading in conjunction three provisions—§ 204(b), § 205(b) and § 225.

A. Section 204 (b), the substantive provision, is written in mandatory terms: "[T]here shall be no adjustment * * * if * * *." Thus, the statute does not merely *permit* the Secretary to forego recovery of overpayments if so requested; it *forbids* recovery, as a matter of public policy, in the situations described in the section.

Pertinent in this regard is the fact that one of the sub-

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[5] It must be remembered, in this regard, that providing an *opportunity* for an oral hearing is not equivalent to providing a hearing in each case. Especially where, as here, there is nothing particularly to be gained by delay alone, the beneficiary will have his or her own reasons to forego an oral hearing unless he believes it will be of material aid in resolving the issues; appearance at an oral hearing is likely both to inconvenience and to intimidate the average person and, particularly, the average aged or disabled person.

stantive standards of § 204(b) is whether "such adjustment or recovery would defeat the purpose of this subchapter." The chief "purpose of this subchapter" is to

> assure that when earnings from work are cut off because of the retirement, disability, or death of the family breadwinner, each covered worker and his family will have a continuing source of income related to his previous earnings and to assure that they can get this protection with dignity. [Report of the Advisory Council on Social Security, H.R. Doc. No. 9290, 92d Cong., 1st Sess. pp. 48-49.]

Thus, the procedures used to implement § 204(b) must be reasonably adapted to assuring "a continuing source of income" to individuals overpaid in the past through no fault of their own.

Viewed in this light, the present procedures are deficient. For, the Secretary rather than simply announcing that there has been an overpayment and soliciting from the recipient the facts pertinent to the standards of § 204(b) before deciding whether there is to be recovery, announces at least a partial interruption of the benefits and awaits a protest from the claimant before seeking any information whatever pertinent to § 204(b). Moreover, by penalizing those who do come forward with the possibility of a larger deprivation of benefits than if they had failed to assert statutory rights, the present procedures affirmatively discourage the development of facts reasonably adapted to accurate implementation of § 204(b).

While the above analysis illustrates, in our view, that the present procedures plainly contravene § 204(b), that analysis alone does not necessarily lead to the conclusion that the statute requires an opportunity for a prior *oral*

hearing. Read in conjunction with other portions of the Act, however, we believe that at the least that conclusion, which would pretermit the need for a constitutional decision is "fairly possible." (*Street, supra.*)[6]

B. Section 205(b) is the provision basically establishing the right to an oral due process hearing to review decisions by the Secretary. It reads, as here pertinent, as follows:

> (b) The Secretary is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Upon request by any such individual or upon request by a wife, divorced wife, widow, surviving divorced wife, surviving divorced mother, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Secretary has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse his findings of fact and such decision * * *.

Reading this provision in conjunction with § 204(b) confirms the conclusion that, at the very least, the Secretary's present procedures do not comport with the statute insofar as they fail to provide for any development, written *or* oral, of any facts pertinent to § 204(b) before, in effect, announcing a determination that the section's standards

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[6] The Court, of course, may disagree with the remainder of our statutory analysis, and disagree as well with the constitutional determination of the Court of Appeals. If so, the fact that the Secretary's present procedures do plainly contravene the statute by failing to implement § 204(b) at all except upon specific request, and by discouraging such requests, ought to result in a remand for determination of an appropriate remedy for *that* statutory violation.

have not been met. For, § 205(b) mandates that any "decisions as to the rights of any individual * * * under this subchapter" be accompanied by "findings of fact." "Findings of fact" require, first, facts. Yet, at present *no* attempt is made at the initial stage to elicit the relevant facts.

Further, as noted above, whatever may be true with regard to other situations in which § 205(b) applies, many issues which arise under § 204(b) are resolvable in a reasonably accurate manner only if the ultimate finder of fact is able directly to observe the character and demeanor of the claimant. Thus, the language and purpose of § 204(b) are best implemented if § 205(b) is read to require an opportunity for a *prior* oral hearing where the claimant believes such a hearing would be useful in demonstrating a lack of "fault," an inconsistency with the purposes of the Act, or a violation of "equity and good conscience." (§ 204(b).)

Certainly, the principles of *Greene, supra,* call for reading § 205(b) as requiring an opportunity for *prior* oral hearings when § 204(b) is at issue. For, § 205(b) lacks the "most explicit action by the Nation's law-makers" (360 U.S. at 508) necessary if, despite the weighty constitutional considerations surveyed by the Court of Appeals, the Act is to be read to permit hearings too late to assure that, "there [is] * * * no * * * adjustment of payments" when the substantive standards of § 204(b) are met.

C. There is, in another part of the Act, a direct indication that § 205(b) not only may but *should* be read to require an opportunity for prior oral hearings on § 204(b) issues. Section 225 deals with a different situation than that involved in this case—one in which the Secretary "believes that an individual * * * may have ceased to be under a

disability." In that situation, § 225 explicitly permits "the Secretary [to] * * * suspend the payment of benefits under * * * section 402(d), 402(e), 402(f) or 423 of this title until it is determined (as provided in section [221] of this [Act]) whether or not such individual's disability has ceased * * *." Section 221, in turn, provides that "[a]ny individual dissatisfied with any determination [of] whether or not he is under a disability shall be entitled to a hearing * * * [under] section [205(b)] * * *."[7]

If § 205(b) itself ordinarily permitted the hearing provided to be held after suspension of any benefits already being received, then § 225 would be entirely superfluous—suspension of benefits prior to a hearing would be allowed under § 205(b) itself, as incorporated in § 221. Thus, § 225 is most sensibly read as an *exception* to the usual timing of a § 205(b) hearing, and § 205(b), in turn, is best interpreted as requiring a hearing *prior* to any suspension of benefits unless the statute elsewhere expressly provides otherwise. Since there is no provision parallel to § 225 when suspension of benefits because of earlier overpayments is in question, the statute as a whole is most reasonably construed to require that the entire decision-making process, including an opportunity for oral hearing under § 205(b) on whether recovery is precluded by § 204(b), be completed *before* benefits are withheld.

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[7] *Mathews* v. *Eldridge,* 424 U.S. 319, involved a suspension of benefits received under § 223 (*id.,* at 323), so that the suspension in that case was explictly permitted by § 225. This explains why avoidance of constitutional determination through statutory interpretation was not "fairly possible" in *Eldridge,* and shows that the statutory approach to this case we suggest is not inconsistent with *Eldridge* in any way.

There are two ready explanations for drawing a distinction between disability determinations and waiver decisions in setting the timing of a § 205(b) hearing. The first is the significant difference between the two situations as regards the necessity for oral confrontation; that difference was the principal reason why the Court of Appeals felt the constitutional balance struck in *Eldridge, supra,* was not controlling here. Secondly, if the Secretary's "belief" that a disability has ceased is later confirmed, then any benefits paid while the decision-making process continued would not be due at all, and might well be lost to the social security system forever. In contrast, in § 204(b) cases, continuing benefits while completing as careful as possible a waiver determination ordinarily will simply delay recoupment rather than rendering it impossible. This explains why Congress appears to have viewed the balance of public versus private interest as tipped in one direction in the case of disability terminations and in the other in the waiver situation.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE GRAY PANTHERS IN SUPPORT OF RESPONDENTS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE GRAY PANTHERS IN SUPPORT OF RESPONDENTS

MOTION OF GRAY PANTHERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Gray Panthers respectfully move this court, pursuant to Supreme Court Rule 42(1), for leave to file the accompanying brief in this matter as amicus

curiae in support of the respondents. In support of this motion, the Gray Panthers submit the following statement outlining their interests in the issues presented by these consolidated cases:

1. Respondents have consented to the Gray Panthers request to submit a brief amicus curiae in support of their position. By letter to Peter Buscemi, Assistant to the Solicitor General, dated January 11, 1979, the Gray Panthers have requested the consent of the petitioner, the Secretary of Health, Education, and Welfare, to the filing of their brief. To date, the Gray Panthers have received no response to that letter. Should the Secretary grant his permission to the filing of their brief, the Gray Panthers will promptly notify the court.

2. The Gray Panthers are a national organization of old and young persons who seek to reform and improve various institutions and laws that affect the lives of senior citizens throughout the United States. Since their establishment nearly a decade ago, a major concern of the Gray Panthers has been to protect the rights

under the Constitution and laws of the United States of people who depend on monthly Social Security benefits for the necessities of life. A large proportion of the membership of the Gray Panthers consists of Social Security recipients, many of whom enjoy little or no income beyond their Social Security benefits. For this reason, the Gray Panthers have consistently espoused the rights of Social Security beneficiaries before the Congress, before the Social Security Administration, and, where appropriate, before the federal courts.

3. The Gray Panthers submit that their views may be especially useful to the court in resolving the issues presented by this appeal. One of the factors likely to be assessed by the court in determining whether an opportunity for an oral hearing must precede the Social Security Administration's recoupment of previous overpayments from a recipient's current benefits is the weight of the interest of an innocent and dependent recipient in the uninterrupted receipt of his or her benefits.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The large number of Social Security recipients included among their members enables the Gray Panthers to offer a firsthand, practical evaluation of this interest.

4. The perspectives of the Gray Panthers on the matters presented by this litigation are augmented by the experience of their counsel, staff attorneys at the National Senior Citizens Law Center, with the jurisdictional and remedial questions raised by the Secretary's petition for writ of certiorari. A substantial portion of the practice of the National Senior Citizens Law Center is devoted to the representation of Social Security claimants and recipients. National Senior Citizens Law Center attorneys have recently appeared before this court in Califano v. Sanders, 430 U.S. 99 (1977). In addition, National Senior Citizens Law Center attorneys are counsel of record for plaintiffs in two cases cited by the Secretary as similar to the present one, both of which are currently pending in the lower federal courts. Shannon v.

United States Civil Service Commission, 444 F.Supp. 354 (N.D.Cal. 1977), appeal pending No. 78-1933 (9th Cir.); Pope v. Railroad Retirement Board, and Thrash v. Railroad Retirement Board, Civil Nos. 77-2166 and 78-0313 (D.D.C.) (brief for petitioner at 51-52). The Gray Panthers' counsel are therefore conversant with the issues presented by the Secretary's petition in this case.

WHEREFORE, the Gray Panthers respectfull move that the court grant them leave to file the brief amicus curiae which accompanies this motion.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE GRAY PANTHERS

Interest of the Amicus

A statement describing the Gray Panthers and their interest in this case is set forth in the preceding motion requesting leave to file this amicus curiae brief.

Summary of Argument

Amicus curiae Gray Panthers offer argument on only two of the issues presented for review by the Secretary's petition for writ of certiorari. First, amicus contends that the interest of a recipient of Social Security benefits in uninterrupted receipt of those benefits, pending the outcome of an oral hearing of his claim for waiver of previous overpayments, is extremely substantial. According to former Social Security Commissioner, Robert M. Ball, Social Security is "the most important single source of income for the great majority of the more than 33 million beneficiaries, and it is responsible for keeping some 12 to 13 million Americans above the government defined poverty level". BALL, SOCIAL SECURITY TODAY AND TOMORROW, Columbia

University Press, 1978, at 14,15. For nearly 40 percent of Social Security recipients, then, uninterrupted receipt of monthly benefits is the only barrier between modest comfort and severe deprivation.

If this barrier is removed, neither the federal Supplemental Security Income program nor state and local plans for general assistance are likely to provide an adequate substitute. Supplemental Security Income benefits become available only after long delays in the processing of applications and are even then extremely meager. In 1978, the federally guaranteed SSI floor ($177.80 per month for an eligible individual) still fell below the 1976 official poverty standard. This federal minimum was supplemented by only 24 of the states, including the District of Columbia.

Local general relief programs are even less likely to provide an adequate substitute for the monthly income lost during a suspension of Social Security benefits. In the 42 states reporting general assistance data to the Social Security Administration for the month of June, 1978, the

average monthly benefit per recipient was about $127. In no state do general assistance payments provide nearly enough to meet basic living expenses as defined by the 1976 federal poverty standards. The federal and state welfare benefits, which the Secretary suggests will be available to alleviate the needs of Social Security recipients while their benefits are suspended, are in fact not so readily forthcoming as he supposes, nor are they the complete defense against abject poverty which he portrays them to be. The "brutal need" from which public assistance recipients were shielded by this court's decision in Goldberg v. Kelly, 397 U.S. 254, 261 (1970), may well be the lot of many recipients of Social Security benefits if a similar shield is not also erected here.

Amicus' second contention is that the class wide, declaratory and injunctive relief awarded by the courts below is fully authorized by the remedial powers granted by Congress to the federal judiciary. Amicus contends that the relief granted by the lower courts flows most

directly from the power conferred by section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), to "affirm, reverse, or modify" decisions of the Secretary denying Social Security benefits as augmented by the Declaratory Judgment Act, 22 U.S.C. §§ 2201, 2202, and Rule 23 of the Federal Rules of Civil Procedure. Alternatively, however, amicus also submits that the lower court's analysis of the scope of its historical power to issue appropriate writs of mandamus to federal officers was correct and that nothing in section 205(h) of the Social Security Act, 42 U.S.C. § 405(h), was designed to alter or limit that power.

ARGUMENT

I.

The Private Interest of An Eligible Social Security Recipient In Uninterrupted Receipt of Benefits Is Substantial Enough to Warrant the Protection of A Pre-recoupment Oral Hearing.

In its decision in Mathews v. Eldridge, 424 U.S. 319 (1976), this court found that one of the three elements to be weighed in determining the specific dictates of due process in a particular situation is "the private interest that will be affected by ... official action". 424 U.S. at 336. Elaborating on this standard, the court went on to point out that "the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decision-making process". Id. at 341. When the situation of Social Security beneficiaries facing reduction of their monthly benefits in order to recoup previous overpayments is measured against this test, the potential harms which emerge are substantial indeed. For many recipients, an interruption in the continuous receipt of monthly Social Security

benefits may threaten the ability to provide for the necessities of life.

All parties, as well as the courts below, have conceded that basic eligibility for all three types of Social Security benefits, retirement, survivors, and disability, does not depend directly on a claimant's ability to prove financial need.[1/] But the absence of proof of financial need as a condition of eligibility for Social Security benefits by itself reveals very little about the economic plight of Social Security recipients, or the degree to which their monthly benefits provide the only secure

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1/ The Court of Appeals did point out, however, that the so-called Social Security "retirement test" does place strict limits on the amount of earned income a recipient of Social Security retirement or survivor's benefits may accrue and still retain eligibility under the program. To this extent, the court pointed out, Social Security benefits are need related and thus similar to the public assistance payments at issue in Goldberg v. Kelly, 397 U.S. 254 (1970); Elliott v. Weinberger, 564 F.2d 1219, 1231, n. 16 (9th Cir. 1977); see also section 203(b) of the Social Security Act, 42 U.S.C. § 403(b).

barrier against abject poverty.

Robert M. Ball, Social Security Commissioner under Presidents Kennedy, Johnson, and Nixon, last year completed an authoritative and comprehensive study of the Social Security program. BALL, SOCIAL SECURITY TODAY AND TOMORROW, Columbia University Press, 1978. Mr. Ball's book gives special emphasis to the economic plight of the elderly and to the role of Social Security payments in alleviating poverty among retired and disabled Americans. Perhaps the most significant finding set forth in Commissioner Ball's book is that "poverty or near poverty is all too often still the lot of a significant proportion of the elderly". BALL, supra, at 88. Even after Social Security benefits, more than 20% of the nation's 16 million elderly families in 1976 had total incomes below the official poverty level of $2730 per year for a single person living alone and $3440 for an elderly couple. An even more revealing finding is that without Social Security benefits a large majority of elderly families

would be officially defined as poor. If the incomes of old people were limited to what they had saved, could receive as annuities from employment related pension plans, or could earn by continuing to work after retirement age, 60% of them in 1976 would have been officially defined as poor. Thus, for nearly 40% (or more than six million) elderly families, Social Security benefits represent the difference between a modestly comfortable living standard in retirement and extreme poverty. BALL, at 89-90. Commissioner Ball does not exaggerate the importance of Social Security benefits in preventing poverty when he concludes that "Social Security is the key to the economic well-being of the great majority of retired elderly people". BALL, supra, at 90.

Given Commissioner Ball's portrait of the economic situation of the aged, the fact that Social Security payments are not triggered by the direct application of a means test does not provide reliable indication of the "degree of potential deprivation that may be created" by an interruption in a recipient's right to

receive his monthly benefit check. Mathews v. Eldridge, supra, 424 U.S. at 341. For many Social Security recipients, that check quite literally provides the means to purchase the necessities of life.[2/]

The Secretary does not dispute the important role played by Social Security

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2/ The Secretary now apparently acknowledges the severe hardships which often result from a suspension of Social Security benefits. The new Claims Manual provisions, unveiled for the first time in his Brief for the Petitioner, would limit, for at least some recipients, the amount of monthly benefits subject to suspension in order to recover overpayments to 25% of the recipient's normal monthly check. For June of 1978, the average monthly Social Security benefit paid was about $260 (Social Security Bulletin, October, 1978). But for a recipient whose income exceeds the official poverty level only because of his entitlement to Social Security benefits, a loss of even $65 per month (25% of $260) can be devastating indeed. In any event, the Secretary's new 25% limit apparently applies only in the case of a recipient who agrees to forego his statutory right to request waiver of recovery of the overpayment (Brief for the Petitioner, at 32). Thus, members of the class represented by respondents will continue to be subject to a complete suspension of benefits if deemed appropriate by the Secretary.

benefits in relieving poverty among recipients. Rather, he suggests that a reduction in benefits will not often cause severe deprivation because of the supposedly easy availability of adequate substitute benefits from either the federal Supplemental Security Income (SSI) program or from state and local general assistance plans. (Brief for the Petitioner, at 33-36.) With deference to the Secretary, amicus submits that he has seriously overestimated both the accessibility and sufficiency of the benefits provided from these alternative sources of subsistence income.

If, as the Secretary suggests, a suspension of Social Security benefits in order to recover previous overpayments is generally brief and temporary, then it is equally true that the income lost because of such a suspension can be replaced, if at all, only by a program capable of responding quickly to emergency needs. The operation of the SSI program is, unfortunately, not characterized by this sort of flexibility. The SSI program is, of course, operated by the Social Security Administration.

Perhaps not surprisingly, the Administrative review process by which claims for SSI benefits are evaluated has not escaped the "torpidity" found by this court to pervade the determination of Social Security disability appeals. Mathews v. Eldridge, supra, 424 U.S. at 342. Among new applications for SSI benefits based on age filed in the month of September, 1977, the average processing time between application and initial determination of eligibility was 33 days. In the case of new applications based on blindness or disability, the average September, 1977 processing time was 59 days.[3/] For a Social Security recipient whose chief or sole source of income had been the monthly benefits suspended in order to recover a prior overpayment, a

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3/ These average processing periods do not reflect the time necessary actually to place an initial check for monthly SSI benefits into the mail to a new applicant, as they do not include the period following an initial determination of eligibility during which that determination is certified to the United State Treasury Department which then prepares and mails the initial benefit check.

five to nine week period without any income whatever will nearly always present a substantial hardship and will, in many cases, be devastating.[4/]

The average processing times for SSI claims provide only an incomplete picture of the deprivations which result from the slow pace of the SSI application process. Thus, even though the average processing time for an SSI claim based on age filed in September, 1977 was 33 days, fully 38% of these claims were not processed within the first 30 days following their filing date and 22% were still pending after 45 days. For claims based on blindness and disability, the picture again was correspondingly worse: 40% of the claims filed in September of 1977 were still pending after 60 days, and 17% had still not been determined after 90 days. In light of these statistics, it is fair to say that for many Social Security

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4/ The only relief available to an SSI applicant awaiting deposition of his claim is a single non-renewable emergency advance payment of $100, less than one-half the monthly income by which poverty was officially defined in 1976. 42 USC 1383(a)(4)(A).

recipients suffering a suspension of benefits because of a previous overpayment, the availability of SSI benefits as a prompt and adequate substitute is largely theoretical. Even if, as the Secretary argues, elderly and disabled Social Security recipients generally are eligible for SSI benefits, this eligibility will often be translated into dollars usable for food and shelter only after the Secretary's suspension of Social Security benefits has worked its harm.[5/]

Even those recipients whose SSI benefits do not come too late will often find that they amount to too little to pay the

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5/ In fact, many elderly and disabled Social Security recipients are not eligible for SSI benefits no matter how great their short-term financial needs may be. Throughout the period during which this lawsuit has been pending, SSI eligibility was restricted to persons whose net worth, aside from a home and certain other excluded resources, was less than $1500. 42 U.S.C. § 1382(a)(1)(B), § 1382(b)b. The foregoing statistics on processing times for SSI applications are drawn from the trial memorandum filed by the Secretary on January 10, 1978 in Ferguson v. Califano, No. CV 75-2620-RF (C.D.Cal.).

ordinary living expenses formerly met by Social Security. During 1978, the maximum federal SSI payment to an eligible individual was $177.80 per month, a level slightly below the official poverty standard set two years before in 1976. 42 U.S.C. § 1382(a)(1)(A). This maximum was payable only to an applicant with virtually no other income. 42 U.S.C. § 1382a. This federal maximum was supplemented by only 24 of the 50 states and the District of Columbia. Most of these state supplements brought the total maximum SSI payment to only slightly more than $200 per month for an eligible individual.[6/] It

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6/ The highest combined federal, state SSI benefit (excluding Alaska) was $296 per month, paid in Massachusetts, an amount barely 25% above the poverty line. Former Social Security Commissioner Ball has described the situation of an elderly person living at this income level as "near poor" and, therefore, as presenting "great difficulty in making ends meet." According to Mr. Ball, the "inadequate income" received by such a recipient "is still the number one problem, bringing with it a host of other problems: inadequate housing, inadequate opportunity for participation in community activities and recreation, and inadequate health care." BALL, SOCIAL SECURITY TODAY AND TOMORROW, supra, at 89.

is fair to say then that of those Social Security recipients suffering benefit suspensions who are able to receive SSI benefits in time to help remedy their loss, the level of benefits payable will very rarely avert the deprivations which accompany a subpoverty level income. (The foregoing data on federal and state SSI benefits payable in 1978 is drawn from U.S. Senate Committee on Finance, Subcommittee on Public Assistance, Staff Data and Materials on Public Welfare Programs (April, 1978.)

The Secretary's reliance on state and local programs of general assistance to fill the income void created by a suspension of Social Security benefits is, if anything, less justified than his confidence in the SSI program. To begin with, eligibility requirements for general assistance benefits vary greatly from state to state and locality to locality. There is no assurance that a Social Security recipient whose benefits have been suspended will be able to qualify for the general relief made available in the political jurisdiction where he resides. More important, in no state

do the benefits provided by general assistance programs approach a level sufficient to provide for basic living expenses. Within the 42 states and territories reporting data on their general assistance programs to the Social Security Administration for the month of June, 1978, the average monthly benefit per recipient amounted to only about $127, barely more than 50% of the 1976 official poverty standard. General assistance benefits ranged from a low of $9.40 per month (West Virginia) to a high of $154.55 per month (District of Columbia). In only 13 jurisdictions did the annual value of general assistance payments, plus the bonus value of food stamps, exceed $2,000. General assistance programs, in short, do not even purport to cover basic living costs and can in no way be expected to meet the current food and shelter expenses of a Social Security recipient whose benefits have been suspended. (The foregoing data concerning general assistance programs is drawn from U.S. Department of HEW/Social Security Administration, Office of Research and

Statistics, Public Assistance Statistics, June, 1978 (October, 1978).

The plight of a Social Security recipient whose monthly benefits are significantly reduced or suspended in order to recoup a previous overpayment is, thus, far closer to that of the welfare recipient protected by this court's decision in Goldberg v. Kelly, supra, than is acknowledged by the Secretary. Former Commissioner Ball's analysis shows that despite the absence of means tested eligibility the Social Security program is designed chiefly to redress and prevent poverty among the nation's aged and disabled citizens. The inadequacy of alternate benefits from either the Supplemental Security Income program or state and local general relief programs (and in the case of SSI, the inability of the Social Security Administration to respond promptly to emergency needs) means that a loss of Social Security benefits will often leave a recipient with no adequate means to provide for the necessities of life. The severe deprivation which this court took pains to prevent by its decision in

Goldberg will plainly be the lot of many of the aged and disabled poor should the court now fail to affirm the holding of the Court of Appeals. The interests of recipients in uninterrupted receipt of Social Security benefits pending an oral hearing on their claims of entitlement to waiver of recovery of prior overpayments is substantial indeed. The strength of this interest points strongly toward a requirement that such a hearing be afforded as a matter of due process before any suspension of benefits is undertaken.

II.

The Decision of the Court of Appeals to Grant Declaratory and Injunctive Relief to A Class of Similarly Situated Social Security Beneficiaries Was Well Within Its Authority.

A. The jurisdiction conferred by the Social Security Act, 42 U.S.C. § 405(g), neither precludes certification of a class authorized by Rule 23 of the Federal Rules of Civil Procedure nor limits the form of relief which may be granted by the federal courts.

The decision of the Court of Appeals to affirm the district courts' class certification orders and awards of declaratory and injunctive relief on behalf of class

members relied quite specifically on the appeals court's holding that jurisdiction over respondents' suits could properly be maintained under the mandamus power of the federal courts. 28 U.S.C. § 1361; Elliott v. Weinberger, supra, 564 F.2d 1219, 1225 n. 8a. While amicus Gray Panthers concur fully with the Court of Appeals' analysis of the mandamus power, amicus also submits that the court need not have undertaken its exhaustive analysis of the history and scope of federal mandamus jurisdiction, for the grants of class certification and injunctive relief made by the district courts and approved by the Court of Appeals were fully authorized by, and consistent with, the basic jurisdictional grant contained in the Social Security Act itself. 42 U.S.C. § 405(g).

Purporting to rely on this court's decision in Weinberger v. Salfi, 422 U.S. 749 (1975), the Secretary contends that the authorization of judicial review over Social Security appeals contained in section 405(g) "manifests a congressional intent to bar class actions" (Brief for the Petitioner, at 66). The Secretary's

argument is apparently based on the fact that section 405(g) authorizes "any individual" to sue in federal district court in order to obtain judicial relief from an adverse decision on that individual's claim.[7/] The Secretary concedes that the federal courts of appeal which have considered his argument have been virtually unanimous in rejecting it. Caswell v. Califano, 583 F.2d 9 (1st Cir. 1978); Jones v. Califano, 576 F.2d 12 (2d Cir. 1978); Liberty Alliance of the Blind v. Califano, 568 F.2d 333 (3rd Cir. 1977); Jimenez v. Weinberger, 523 F.2d 689 (7th Cir. 1975); Johnson v. Mathews, 539 F.2d 1111 (8th Cir. 1976). The Secretary would, nevertheless, urge this court to reject all of these decisions on the

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7/ 42 U.S.C. § 405(g) provides, in pertinent part, as follows:

> "Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within 60 days after the mailing to him of notice of such decision or within such further time as the Secretary may allow."

ground that they "accord insufficient respect to the relevant statutory language". (Brief for the Petitioner", at 68.)

Amicus submits that the opinion of Mr. Justice (then judge) Stevens in Jimenez v. Weinberger, supra, an opinion which devotes considerable attention to the "relevant statutory language", persuasively disposes of the Secretary's argument. To Mr. Justice Stevens' analysis, amicus would add only that the Secretary's attempt to turn the appearance of the phrase "any individual" in section 405(g) into a prohibition against class actions is inconsistent with the purposes of Rule 23, with the language of federal jurisdiction statutes generally, and with common sense. To begin with, virtually all jurisdictional statutes are cast in individual terms. The civil rights statute, 28 U.S.C. § 1343, for example, provides that "the district court shall have original jurisdiction of any civil action authorized by law to be commenced by any person". The recently enacted Employee Retirement Income Security Act of 1974

(ERISA), which authorizes judicial review of claims denied by private pension plans, states that a civil action may be brought "by a participant or beneficiary" of such a plan. 29 U.S.C. § 1132(a). Even the federal question jurisdiction statute, 28 U.S.C. § 1331, speaks in terms of the individual "plaintiff" in providing that costs may be assessed against a successful litigant whose claim is ultimately found to be worth less than $10,000. 28 U.S.C. § 1331(b). And finally, the mandamus statute, 28 U.S.C. § 1361, a jurisdictional grant which is admitted by the Secretary to authorize class wide relief in situations where it is applicable, authorizes the federal courts "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff".

No one has seriously suggested that the use of the singular form of "plaintiff", "participant", or "person" in these statutes evinces a congressional design to preclude federal courts assuming jurisdiction over suits brought under their authority from entertaining an

otherwise appropriate motion for class certification. That such an argument has not heretofore been advanced is not surprising, for the major consequence of its acceptance would be a de facto repeal of Rule 23 of the Federal Rules of Civil Procedure. The major purpose of Rule 23 is, of course, to permit a single adjudication to dispose of what otherwise would be a multitude of individual claims. 3B MOORE'S FEDERAL PRACTICE, ¶ 23.02[1]. The logic of the Secretary's position would undermine the attainment of this purpose in nearly all the categories of federal litigation for which Rule 23 was designed. The Secretary's argument, in short, proves far too much. Congress' decision to allow "any individual" to secure judicial review of an adverse decision concerning his Social Security benefit rights does not bar a class action which is otherwise proper under Rule 23 and consistent with the administrative exhaustion requirements outlined by this court's opinion in Mathews v. Eldridge, supra.

The Secretary's contention that injunctive relief is also precluded by section

405(g) is structured along similar lines to his suggestion that a Social Security Act class action is, per se, improper. The Secretary's reasoning proceeds from the power granted to a federal district court by section 405(g) "to enter ... a judgment affirming, modifying, or reversing the decision of the Secretary". The Secretary finds the absence in this grant of authority of any reference to declaratory or injunctive relief to be "restrictive" in nature and to suggest that the general equitable powers of the federal courts simply "do not pertain to claims and remedies under Title II of the [Social Security] Act". (Brief for the Petitioner at 72.)

Once again, the Secretary's position has been rejected by those courts of appeal which have considered it. See particularly, Johnson v. Mathews, supra, 539 F.2d at 1125, 1126; Caswell v. Califano, supra, 583 F.2d at 14, n. 12; Jones v. Califano, supra, 576 F.2d at 14. And, once again, the logic of the Secretary's argument is overbroad. Federal jurisdictional statutes frequently do not

directly specify that relief may be awarded in the form of a declaratory judgment or an injunction. But such specification is in no way a prerequisite to such an award, since the authority of a federal court to issue such relief grows out of its power to exercise the "traditional practices of an equity court", Hecht Company v. Bowles, 321 U.S. 321 (1944); Johnson v. Mathews, supra, 539 F.2d at 1125. Nothing in section 405(g) demonstrates any intention to limit the federal court's traditional equitable powers.

The authority of a federal court sitting in equity to issue appropriate declaratory and, where necessary, injunctive relief has, moreover, been codified by the Declaratory Judgment Act, 22 U.S.C. § 2201, 2202. While not a jurisdictional statute, the remedial powers conferred by the Declaratory Judgment Act are plainly applicable whenever jurisdiction is otherwise appropriate. Terminal Freight Handling Company v. Solien, For and On Behalf of NLRB, 444 F.2d 699 (8th Cir. 1971), cert. denied 405 U.S. 996 (1972).

If, as the Secretary suggests, these powers could be exercised only when the authorizing jurisdictional statute contained some reference to "equitable" relief (Brief for the Petitioner, at 72-73), the impact of the Declaratory Judgment Act and its attendant grant of power to issue appropriate injunctive decrees would be largely redundant and its enactment hardly necessary.

Congress plainly has the authority to limit the equitable powers and discretion of the federal courts. Johnson v. Mathews, supra, 539 F.2d at 1125. However, unless every jurisdictional statute which does not specifically refer to these powers is to be construed as precluding their exercise, section 405(g)'s grant of authority to affirm, reverse, or modify a decision of the Secretary should not be construed as imposing such a limitation. The Secretary's contrary argument again proves far too much.[8/]

8/ It may be significant that in the present case, the declaratory and injunctive relief allowed by the Court of
(This footnote is continued on next page.)

Appeals is, as a practical matter, far less drastic than the form of relief entailed by a slavishly literal adherence to the "affirm, reverse, or modify" language of section 405(g). The injunctions entered by the district courts operate with prospective effect only and do nothing more than force the Secretary to adjust his future recoupment policies to the requirements of the Constitution. But under the Secretary's interpretation of section 405(g), the appropriate relief would apparently have been to "reverse" all overpayment recoupment decisions made by the Secretary with respect to class members, thereby entailing the return of all monies collected through the reduction and suspension of benefits during the recoupment period.

It should be noted that the inherently prospective outlook of an injunctive decree is consistent with certification of a class whose members have met the exhaustion requirements of section 405(g). Social Security recipients who have not yet been threatened with a suspension of benefits in order to effect recovery of prior overpayments do not presently have ripe claims against the Secretary and, thus, do not have independent standing to bring suit. The value of the injunctive decree, affirmed here by the Court of Appeals, is that it permits the Court's judgment on the merits to become automatically applicable to future targets of recoupment without need for a new lawsuit. This result vindicates the "basic human claim that the law should provide like treatment under like circumstances".
(This footnote is continued on next page.)

B. The exercise of mandamus jurisdiction approved by the Court of Appeals is not precluded by section 205(h) of the Social Security Act, 42 U.S.C. § 405(h).

This court must address the question whether the lower court's assumption of mandamus jurisdiction in this case was permissible only if the relief awarded by the district courts and affirmed by the Court of Appeals is not, contrary to amicus' argument above, contemplated by the jurisdictional provision of the Social Security Act, 42 U.S.C. § 405(g). But if the mandamus jurisdiction issue is reached by this court, amicus submits that it was resolved correctly by the Court of Appeals.

In urging reversal of the Court of Appeals' approval of the exercise of mandamus jurisdiction, the Secretary does argue, albeit without much enthusiasm, that respondents' cases did not present claims appropriate "for the exercise of

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Jones v. Califano, supra, 576 F.2d at 20. Quoting FRIENDLY, FEDERAL ADMINISTRATIVE AGENCIES 19 (1962), "we know that in a unitary court system, it is not stare decisis alone that binds the structure but also a recognition that like treatment is the touchstone", id.

mandamus jurisdiction". (Brief for the Petitioner, at 63-64.) But the core of the Secretary's argument against the lower court's reliance on the mandamus power is his contention that section 205(h) of the Social Security Act completely precludes mandamus jurisdiction in all suits arising in the context of the Social Security program. With due respect to the Secretary, amicus contends that this contention can be made only by ignoring the history of the federal courts' mandamus jurisdiction, especially as that history relates to the enactment of section 205(h), 42 U.S.C. § 405(h).

Statute 42 U.S.C. § 405(h) provides, in relevant part, that:

> "No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or government agency except as herein provided. No action against the United States, the Secretary, or any officer, or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter."

At the time the foregoing language was enacted in 1935, 49 Stat. 624, section 41 of Title 28 of the United States Code comprised most grants of subject matter

jurisdiction to the federal courts. It did not, however, include mandamus jurisdiction which at that time was grounded entirely in the common law of the District of Columbia. Mandamus had been available in the courts of the District of Columbia as a non-statutory remedy to compel performance of duties owed by federal officials since the establishment of the District as the nation's capitol. See McIntyre v. Wood, 11 U.S. (7 Cranch) 504 (1813); Kendall v. United States, ex. rel. Stokes, 37 U.S. (12 Pet.) 524 (1838). Since the prohibitions contained in section 405(h) contained, at the time they were enacted, absolutely no reference to common law mandamus jurisdiction, there is no basis for the Secretary's inference that section 405(h) was intended to restrict the ability of persons owed duties by federal officials to enforce them in the courts of the District of Columbia.

In 1948, section 41 of Title 28 was recodified, and its jurisdictional grants restated. Mandamus jurisdiction, however, continued to be grounded exclusively in the common law and to be

available only in the United States District Court for the District of Columbia.

In 1962, Congress acted to end the historical anomaly which required any person, no matter where he lived, to bring a claim in the nature of mandamus in the District of Columbia. The Mandamus and Venue Act of 1962, Pub. L. No. 87-748 (October 5, 1962), was enacted to provide "a remedy by which ... jurisdiction [over federal officers and employees formerly exercised in the District of Columbia courts] could be exercised throughout the country". Smith v. United States, 330 F.2d 70, 72 (10th Cir. 1964). This expansion of the venue for proceedings in the nature of mandamus was in no way designed either to expand or constrict the substantive breadth of the jurisdictional grant. The accompanying codification of common law mandamus jurisdiction at its present location, 28 U.S.C. § 1361, in no way changed the relationship of the mandamus power to other grants of subject matter jurisdiction in existence at the time of such codification.

The foregoing history provides no support for the Secretary's contention that the current appearance of the federal courts' mandamus power in the portion of the United States Code that succeeds section 41 of Title 28 means that the mandamus power was abrogated by the enactment of section 405(h). If section 405(h) did not affect common law mandamus jurisdiction at the time it was enacted, which it plainly did not, it cannot not be said to undermine an identical substantive grant of jurisdiction merely because the expansion of the venue within which that grant could be exercised required that it be codified within Title 28.

In sum, if, as the Court of Appeals properly found, the district courts' jurisdiction over respondents' claims was properly founded on 28 U.S.C. § 1361, that jurisdiction was not ousted by section 405(h). Should this court find it necessary to review the decision of the Court of Appeals upholding the exercise of mandamus jurisdiction, amicus respectfully submits that that decision ought properly to be affirmed.

CONCLUSION

For the reasons outlined in this brief, as well as those suggested in the brief submitted by respondents, amicus urges affirmance of the decision of the Court of Appeals in all respects.

Respectfully submitted,

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